Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

CLYDE T. CARTER,

Petitioner,

v.

HARRY LEE CARTER ESTATE MANAGEMENT TRUST, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Texas

PETITION FOR WRIT OF CERTIORARI BY CLYDE T. CARTER

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QUESTIONS PRESENTED

1.

Was Clyde T. Carter denied due process of law when a successor trial judge – who was not present at trial and heard no evidence in this case – made post-trial evidentiary rulings, reviewed the sufficiency of the evidence to support a huge punitive damage award, and rendered a multi-million dollar judgment against Carter?

2.

Is the due process requirement of meaningful and adequate judicial review of punitive damage awards satisfied when a successor trial judge – who was not present at trial and heard no evidence – makes post-trial rulings on the evidentiary support for the punitive damage award and renders judgment on that award?

LIST OF PARTIES

1. Clyde T. Carter, Petitioner and Appellant below.
2. Harry Lee Carter Estate Management Trust, Appellee below.
3. Blanche Carter Martin, Appellee below.
4. Mollie Martin Cannon, Appellee below.
5. John Carter Martin, Appellee below.
6. Joette Lee Carter, Appellee below.
7. Edward M. Rigsby, Appellee below.
8. Crystal Jones, Appellee below.
9. Grace Carter, Appellee below.
10. Joe Carter, Appellee below.
11. Michael Lee Corum, Appellee below.
12. Neil Corum, Appellee below.
13. Doris Carter Corum, Appellee below.

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OPINIONS BELOW

The lower courts' opinions and rulings are unreported. Copies of relevant decisions are included on the following pages of the petitioner's appendix:

Opinion of the Court of Appeals for the Fourth District of Texas at San Antonio — Pet. App. 1

Texas Supreme Court's Order Denying Writ of Error — Pet. App. 31

Texas Supreme Court's Order
Overruling Motion for Rehearing Pet. App. 33

Trial Court's Judgment Pet. App. 35

JURISDICTION

The Supreme Court of Texas denied Clyde T. Carter's application for writ of error on April 20, 1994 (Pet. App. 31), and overruled his motion for rehearing on June 8, 1994. (Pet. App. 33). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED IN THE CASE

Clyde T. Carter has been denied due process of law guaranteed by the Fourteenth Amendment to the United States Constitution. The text of the Fourteenth Amendment is reprinted in the Petitioner's Appendix beginning at page 64. This case also involves the application of Rule 18 of the Texas Rules of Civil Procedure, the text of which is reprinted in Petitioner's Appendix at page 66.

STATEMENT OF THE CASE

Clyde Carter was a co-trustee and beneficiary of the Harry Lee Carter Estate Management Trust. He originated this suit to declare the Trust terminated and have its assets distributed. The other co-trustees and trust beneficiaries counterclaimed against Clyde for breach of

fiduciary duty, to have him removed as Trustee, and for other equitable relief.

The breach of fiduciary duty aspect of the case was tried in a lengthy jury trial. By its verdict, the jury found that: (i) Clyde Carter breached his fiduciary duty as executor/trustee and that breach caused monetary loss to the Trust in the sum of $7 million; (ii) Clyde Carter's breach of fiduciary duty was done willfully or with reckless disregard of the rights of the Trust beneficiaries or with bad faith; and (iii) $1.1 million exemplary damages should be awarded some 11 of the beneficiaries.

The Honorable Keith Burris presided over the case from its inception through the conclusion of the trial. After the jury returned its verdict, and while the case was pending on post-judgment motions, Judge Burris died. Judge Burris was the only judge familiar with the complex factual details of this case. He died without memorializing his thoughts or opinions regarding the judgment, the associated discretionary awards, or the sufficiency of the evidence to support punishment of Clyde Carter through the exaction of punitive damages. A new judge, the Honorable Robert Lee, was appointed to fill Judge Burris's vacancy. Judge Lee had no prior exposure to this case. Still, he heard the parties' post-trial motions and rendered judgment against Clyde Carter on the verdict. The judgment awarded: (i) $7 million actual damages (which included pre-judgment interest), (ii) $1.1 million exemplary damages in favor of various co-trustee and non-trustee beneficiaries, (iii) $151,962.50 as costs for an auditor's fee, and (iv) attorney's fees.

The state court of appeals affirmed the judgment rendered by Judge Lee and denied Carter's motion for rehearing. The Texas Supreme Court summarily denied Carter's application for writ of error and later overruled his motion to rehear that decision. Hence this petition.

ARGUMENT

The Court should grant writ of certiorari in this case for two reasons:

(i) it presents unanswered questions of national significance concerning vital due process considerations in the rendition of judgment by successor trial judges; and, more important,

(ii) it gives the Court the opportunity to continue the work begun in *Haslip*, and *Oberg* to provide the lower courts guidance on what "meaningful and adequate judicial review" means in the exemplary damage context.

1.

The successor trial judge denied Clyde Carter due process of law when he rendered judgment in this case without hearing any evidence.

The courts below affirmed a judgment that denied Mr. Carter due process because it was rendered by a successor trial judge who heard no evidence, had no basis for assessing the sufficiency of the evidence, and had no background for evaluating the sheer excessiveness of the enormous exemplary damage award.

Rule 18 of the Texas Rules of Civil Procedure (Pet. App. 66) provides that a successor to a judge who dies, resigns, or becomes disabled shall determine all motions left undisposed by his predecessor. Rule 18 does not expressly apply to the act of entering judgment under the circumstances of this case. The effect of the lower courts' application of Texas' Rule 18 is to allow a judge who has heard no evidence to render judgment and engage in judicial review particularly critical to the exaction of punitive damages. In so doing, the lower courts have not adequately addressed the conflicting constitutional rights raised by the application of Texas' Rule 18.

Due process requires that discretionary, post-trial motions, which are necessarily based on the judge's perceptions of trial events, be made by a judge who has participated in some degree in the trial of the case.[1] Due process is acutely implicated because the successor judge in this case was called upon to assess jury findings that

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[1] Reported Texas decisions that uphold post-jury trial, discretionary actions by successor judges contain a common factual thread that is absent from this case: The successor judge particpated to a substantial degree in the actual trial of the case. *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 845-47 (Tex. App. – Houston [1st Dist.] 1987, writ ref'd, n.r.e.) (the successor presided over a substantial portion of the defendant's case-in-chief, constructed the charge, and heard all post-trial motions), *cert. dism'd*, 485 U.S. 994 (1988); *Bickham v. Herring Transp. Co.*, 344 S.W.2d 953, 958 (Tex. Civ. App. – Houston 1961, no writ) (the successor judge presided over a substantial portion of evidence presentation, charge preparation, and closing argument).

would allow punitive damages under Texas law, to render judgment for punitive damages, and review the sufficiency of the evidence to support the findings of punitive culpability and the size of the punitive damage award.

In this case, however, Judge Burris presided over the case from its inception and throughout the two-week trial. He was the only judicial officer familiar with the factual details of the case. Judge Burris's death came after trial, but before the rendition of judgment and the necessary resolution of remaining discretionary issues. And, Judge Burris died without memorializing his thoughts or opinions regarding the judgment and associated discretionary awards.

Judge Lee, the successor judge, was asked to do more than simply memorialize a judgment. He was asked to grant significant requests for original, discretionary relief. The list of rulings Judge Lee made involving the exercise of discretion or the assessment of evidence that he had not heard demonstrates how pervasively he was involved with decisions subject to the Fourteenth Amendment:

- He ruled on substantial factual sufficiency challenges to the evidence and excessiveness of damages, which involved an assessment of the probative value of the evidence and the exercise of discretion;
- He awarded attorney's fees in the judgment, which is entirely a discretionary matter.[2]
- He allowed discretionary relief offsetting Clyde Carter's interest in the Trust against the judgment rendered against him.

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[2] TEX. PROP. CODE ANN. § 114.064(a)

- He assessed the sufficiency of evidence to support exemplary damages and allowed an enormous award to stand.

As a result, a multi-million-dollar verdict, over a million dollars of which is punitive damages, stands unreviewed by a trial judge personally familiar with the unrecordable nuances of trial. The risk that a litigant will suffer unreasonable deprivation of property under these circumstances is great. Due process demands more protection than the lower courts have recognized through their interpretation of Texas' Rule 18.

2.

The successor trial judge, having heard no evidence, could not provide the judicial review of the punitive damage award that due process requires.

Of all the rulings made by the successor judge, the exemplary damage rulings are the most condemnable. The award of exemplary damages is overlaid with a veneer of due process under the Fourteenth Amendment, *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). In *Haslip*, this Court upheld a punitive damage award based on the Alabama system of assessing punitive damages. Significant to the Court's holding in *Haslip* was (i) the availability of "meaningful and adequate review by the trial court", and (ii) that the award was actually "reviewed and upheld by the trial judge." *Haslip*, 499 U.S. at 20.

In its continuing analysis of the persistent difficulties that punitive damage awards pose to our legal system, the Court recently reemphasized that due process

requires meaningful trial court review of punitive damage awards. *Honda Motor Co. v. Oberg*, ___ U.S. ___, 114 S.Ct. 2331, 2334 (1994). In *Oberg*, the Court recognized the very real "possibility that a jury will not follow [punitive damages] instructions and may return a lawless, biased, or arbitrary verdict." *Id.* The Court also spoke candidly about the forces at play in a jury's consideration of punitive damages and the need for adequate judicial review:

> Punitive damages pose an acute danger of arbitrary deprivation of property. . . . Judicial review of the amount awarded was one of the few procedural safeguards which the common law provided against that danger.

Id. at 2341.

That danger, and the need for meaningful and adequate trial judge review, was greater in this case than in *Oberg* because, unlike *Oberg*, the jury instructions in this case were inadequate to provide guidance for the jury's calculation and assessment of exemplary damages. The only instruction given the jury on exemplary damages was the following:

> "Exemplary Damages" means an amount which you may, in your discretion, award as an example to others and as a penalty or by way of punishment. Exemplary damages or punitive damages may be awarded in addition to any amount which may by found or has been found by you as actual damages.

To reduce the inherent dangers of erroneous or excessive punitive awards, due process requires that the judge that reviews the evidence post-verdict and justifies the

award of enormous exemplary damages have heard the evidence. Given the jury's unfettered discretion in cases like this one, the trial judge's role in post-trial review of the punitive damage award assumes heightened significance. In this case, the trial judge's role did not serve its intended purpose because the trial judge who performed the post-trial review was not the judge who sat at trial. The trial judge, having first-hand familiarity with the trial, is at a particular advantage in determining errors in the verdict:

> [The trial judge] has the advantage of observing all of the parties to the trial – plaintiff and the defendant and their respective attorneys, as well as the jury and its reaction of all of the others. There are so many facts of trial that can never be captured in a record, so that the appellate courts are at a special disadvantage when they are called upon to review trial court action.

Hammond v. City of Gadsden, 493 So.2d 1374, 1378-79 (Ala. 1986).

The successor trial judge in this case suffered the same disadvantage in performing his post-trial review. The beneficiaries' counsel recognized as much while arguing post-trial motions and repeatedly emphasized that Judge Lee, being unfamiliar with the record, would have difficulty determining the constitutionality of the punitive damages.

In current Texas practice, subsequent review of a punitive damage award by an appellate court does not satisfy the requirements of due process. The Texas Supreme Court recently recognized this inadequacy:

> Many aspects of the procedures employed up to now by Texas courts do not compare favorably to those examined in *Haslip* and *TXO*.
>
> * * *
>
> We conclude that the Texas procedures for . . . reviewing punitive damages awards . . . in some instances may not adequately ensure that such awards "are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages."

Transportation Ins. Co. v. Moriel, 37 Tex. Sup. Ct. J. 883, 889-900 (June 8, 1994) (quoting *Haslip*).

Texas appellate courts review exemplary damages awards only under traditional concepts of legal and factual insufficiency of evidence. This is simply a search of a given quantum of evidence and provides no review of the quality of the evidence supporting the award. And, in determining legal sufficiency, Texas appellate courts are required to discard all evidence contrary to the jury's findings and indulge all reasonable inferences from the evidence in favor of the finding. *E.g., Davis v. City of San Antonio*, 752 S.W.2d 518, 522 (Tex. 1988). If there is *any* evidence to support the finding, it must be upheld. *E.g., In re King's Estate*, 150 Tex. 662, 664, 244 S.W.2d 660, 661 (1951). In this context, Texas' factual sufficiency review is no better. There, an appellate court may set aside the verdict only if the evidence is so weak as to be clearly wrong and manifestly unjust. *E.g., Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). In short, Texas appellate review "means evidence supporting a punitive damage award is scrutinized less closely on appeal to the highest

court [in Texas] than in some other states." *Moriel*, 37 Tex. Sup. Ct. J. at 897. Texas appellate review, then, simply does not substitute for a post-trial review by the judge who supervised the trial.

In *Haslip*, a significant factor in the constitutionality of the Alabama system for imposing punitive damages was the trial court's performance of an intensive quasi-de-novo review, that included factors and evidence not presented to the jury. Such factors could require a downward adjustment of the award, even though the award is reasonable on the facts known to the jury. *Haslip* 499 at 20; *and see Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 909 (W. Va. 1991). No such review was made here and, in fact, could not have been made by the successor trial judge.

In affirming the successor judge's actions, the court of appeals relied heavily on the fact the judge had the complete statement of facts[3] "available to him." (Pet. App. 10.) In other words, the trial judge could have reviewed a cold, written record before making his decisions. The written record, however, was insufficient to satisfy due process and allow the successor judge to fulfill all roles of a *trial* judge in rendering judgment, in ruling upon post-judgment motions, and in granting original relief because:

(a) the mere presence of the statement of facts does not counterbalance the erosion of Mr. Carter's right to due process, trial by jury, and open courts;

---

[3] In Texas practice, the "statement of facts" is the transcription of the trial testimony and proceedings.

(b) the written record is insufficient since, in entering judgment and in ruling upon challenges to the factual sufficiency or weight and preponderance of the evidence, the trial judge must take into account the demeanor of the witnesses from the witness stand; and

(c) the written record does not alleviate the special disadvantage facing any reviewer other than the trial judge who participated in the actual trial and observed the parties, their counsel, and the jury throughout the trial.

In making the post-trial rulings in this case, the successor judge was without the tools necessary to satisfy fundamental due process by performing the unique and necessary function of *trial judge*. This deprived Clyde Carter of substantial rights to a proper trial by jury and due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

CONCLUSION

For the reasons stated above, Clyde T. Carter's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT OF TEXAS
SAN ANTONIO

* * * ☆ * * *

OPINION

Appeal No. 04-92-00035-CV

Clyde T. CARTER,
Appellant

v.

Harry Lee Carter Estate Management Trust; Blanche Carter MARTIN; Mollie Martin Cannon; John Carter MARTIN; Joette Lee CARTER, Edward M. RIGSBY; Crystal JONES; Grace CARTER; Joe CARTER; Michael Lee CORUM; Neil CORUM; and Doris Carter CORUM,
Appellees

Appeal from the Probate Court No. 2 of Bexar County
Trial Court No. 146,155
Honorable Robert G. Lee, Judge Presiding

Opinion by: Orlando Garcia, Justice

Sitting: Alfonso Chapa, Justice
Fred Biery, Justice
Orlando Garcia, Justice

Delivered and Filed: October 13, 1993

AFFIRMED

This is an appeal from a case to declare a trust terminated and have the assets distributed. Clyde Carter, co-trustee and appellant, sought termination of the trust; the beneficiaries counterclaimed against Clyde for breach of fiduciary duty, to have Clyde removed as trustee, and

for other equitable relief.[1] The case was tried before a jury. The jury found Clyde had breached his fiduciary duty to the trust and estate. Pending post-judgment motions, the presiding judge died. The newly appointed judge then rendered judgment against Clyde. We affirm the judgment of the trial court.

On January 27, 1977, Harry Lee Carter died owning a substantial estate. Harry was survived by his wife Trudy and four nieces and nephews. Harry had no children. In June of 1977 the probate of Harry's estate was transferred from Dallas County to Bexar County. Ancillary probate administrations were opened in Tennessee and Alabama by the four nieces and nephews.[2] On July 13, 1977, all the parties to probate action executed an agreement creating the *Harry Lee Carter Estate Management Trust* to facilitate the administration and distribution of the estate. The agreement settled with Trudy and divided the estate into four equal parts for the families of the nieces and nephews: Clyde, Joe, Blanche, and Doris. Clyde was to be the sole trustee of the trust at that time.

---

[1] The beneficiaries who counterclaimed against Clyde Carter are Doris Carter and family, Joe Carter and family, Blanche Carter Martin and family, and David and Anita Carter the children of Clyde Carter. On appeal, appellees David and Anita Carter defer to the trust representative appellees reply brief for points of error one through six. David and Anita, however, also filed two cross points of error which will be discussed separately.

[2] The contest to the will in other states resulted from the nieces and nephews' attempt to probate a later, hand-written codicil.

In 1979, after the 1977 creation of the trust, disputes arose over Clyde Carter's handling of the trust and over alleged self-dealing. The litigation was resolved in 1979 by an agreed judgment. The agreement provided that Joe, Blanche, and Doris would be named co-trustees of the trust. Checks would be co-signed by a representative of each of the two groups of Joe/Blanche and Doris/Clyde. Doris served as co-administrators of the estate with Clyde.

Over the next twelve years, millions of dollars were generated through the oil and gas interests of the Texas estate. The income was collected and used to pay debts, expenses, taxes, and to marshall the assets. Separate tax returns were filed for each heir, but the trust was handled out of one general fund set of bank accounts. Suspicions and disputes continued over Clyde's self-dealing. The co-trustees and non-trustee beneficiaries believed that reimbursement payments to Clyde were for personal expenses. Those personal expenses included legal fees, income taxes, surveying expenses, and charges made on Clyde's Visa charge card. Some of those charges were for videos, veterinarians, chiropractors, barbers, lumber for Clyde's lakehouse, boots, limousine, glasses, and camper. An accounting of the trust and estate was requested; Clyde refused.

In June of 1989, Clyde sued to terminate the trust; the other co-trustees and non-trustee beneficiaries counterclaimed for breach of fiduciary duty. A court appointed auditor made an accounting of the books and records which took almost one year to complete. The auditors' report revealed 1,447 "questioned transactions." Because of the lack of records, no true audited accounting of the

trust or estate could be made. On August 21, 1990, Clyde was removed as trustee. The present appeal results from a judgment rendered on the co-trustees and non-trustee beneficiaries' counterclaims. The breach of fiduciary aspect of the case was tried in a lengthy jury trial, and the jury found:

1. Clyde's breach of fiduciary duty caused a loss of $7 million to the trust.

2. Clyde's breach was done willfully or with reckless disregard or bad faith resulting $1.1 million in exemplary damages to 11 beneficiaries.

3. Neither the co-trustees (Joe, Blanche, or Doris) nor the co-administrator (Doris) were part of Clyde's breach.

4. Co-trustees benefitted from Clyde's breach of fiduciary duty to the trust in the following amounts: Clyde – $7 million; Doris – $74,912; and Joe – ~~$3,965~~.

5. David Carter (Clyde's son) received $1,900 in excess of his share; no other beneficiaries received an excess distribution.

6. Co-trustees should have discovered the facts giving rise to their claims on the following dates: Joe – October 1986; Doris – October 1986; Blanche – September 1988.

7. Non-trustee beneficiaries should have discovered the facts giving rise to their claims either in September 1988 or February 1991.

8. The jury failed to find affirmatively on Clyde's affirmative defenses of waiver and estoppel.

Appellant presents seven points of error on appeal. In point of error one, appellant contends the trial court lacked jurisdiction to render judgment in this case. Appellant's second and third points of error argue that the successor judge was without authority to render judgment because he heard no evidence in the case. Points of error four and five aver the trial court erred in granting judgment in favor of the co-trustees and non-trustee beneficiaries because their claims are barred by the statue of limitations. In his sixth point of error, appellant contends the judgment, as a matter of law, is excessive by $2,981,130.36. Appellant's final point of error argues that the award of exemplary damages violates due process.

JURISDICTION

We first address appellant's jurisdictional issue. Appellant contends the trial court, as a statutory probate court, lacked jurisdiction over a matter involving an intervivos trust that does not appertain to and is not incident to an estate. Appellant further argues that prior to 1989, the probate court had power to hear all matters which were only incident to an estate involving those instances where a probate proceeding was taking place.

Relying on a case from this court and claiming it to be "virtually identical," appellant asserts that the judgment in the trial court is void and must be vacated. *Coble Wall Trust Co., Inc. v. Palmer,* 848 S.W.2d 696 (Tex. App. – San Antonio 1991) *rev'd Palmer v. Coble Wall Trust Co.,* 851 S.W.2d 178 (Tex. 1992). *Coble Wall,* however, was reversed and remanded. The Texas Supreme Court in *Palmer* held that the 1985 Amendments to Probate Code § 5A(b) did,

in fact, expand the subject matter jurisdiction of the statutory probate court to include all cases "in actions by or against a personal representative." *Palmer,* 851 S.W.2d at 182. Writing for the majority, Justice Gonzales stated,

> While it is true that the 1985 amendment was enacted in order to give probate courts jurisdiction over wrongful death and survival actions, the wording of this amendment and the legislative history behind its enactment contemplates a broader application. In fact, as noted in the House research Organization report on the amendment, the original HB 479 stated specifically that statutory probate courts would have jurisdiction over survival and wrongful death actions, but it was changed to the more expansive wording of "in actions by or against a personal representative." It is evident that this suit falls within the plain meaning of the 1985 amendment.

Palmer, 851 S.W.2d at 182. The decision in *Palmer,* however, only impacts suits brought before September 1, 1989. *Palmer,* 851 S.W.2d at 182, n. 7. Specifically, the 1985 amendment reads:

> In situations where the jurisdiction of a statutory probate court is concurrent with that of a district court, any cause of action appertaining to an estate shall be brought in a statutory probate court rather than in the district court. **In actions by or against a personal representative, the statutory probate courts have concurrent jurisdiction with the district courts.**

The instant case was filed in 1989 by a personal representative of the estate against a co-personal representative of the estate. Consequently, under the holding

in *Palmer*, the statutory probate court does have full subject matter jurisdiction. Moreover, even if the filing had taken place after September 1, 1989, when the 1989 amendment went into effect, the probate court would still have jurisdiction. The 1989 amendment reads as follows:

> (c) A statutory probate court has concurrent jurisdiction with the district court in all actions:
>
> (1) by or against a person in the person's capacity as a personal representative;
> (2) involving an intervivos trust;
> (3) involving a charitable trust; and
> (4) involving a testamentary trust.
>
> (d) A statutory probate court may exercise the pendent and ancillary jurisdiction necessary to promote judicial efficiency and economy.
> (e) Subsection (c) and (d) apply **whether or not incident to an estate.**

We find the statutory probate court does have jurisdiction over the matters in this case. Thus, we overrule appellant's first point of error.

SUBSTITUTION OF JUDGE

In his second and third points of error, appellant urges the successor judge was without authority to render judgment because he heard no evidence in the case. Judge Burris's death took place four days after the court reporter completed the statement of facts from the jury trial. It was almost two months later when Judge Lee made the entry of judgment.

The applicable rule reads as follows:

> **RULE 18. WHEN JUDGE DIES DURING TERM, RESIGNS OR IS DISABLED**
>
> If the judge dies . . . all motions pending, including those for a new trial, shall stand as continued in force until such successor has qualified and assumed office, or a judge has been transferred to said district who can hold said court, and thereupon such judge shall have power to act thereon at the succeeding term, or on an earlier day in vacation, on notice to all parties to the motion, and such orders shall have the same effect as if rendered in term time.

TEX. R. CIV. P. 18. The substitution of judges has clearly been approved by the appellate courts in Texas. *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 846 (Tex. App. – Houston [1st Dist.] 1987, ref'd n.r.e.). While Rule 18 plainly states that a successor judge shall have power to act on "all motions pending" at the time of the predecessor judge's death, "it does not allow rendition of judgment by a judge who has heard no evidence." *W.C. Banks, Inc. v. Team, Inc.*, 783 S.W.2d 783, 786 (Tex. App. – Houston [1st Dist.] 1990, no writ)(the successor judge heard no evidence in a non-jury trial).

Although Rule 18 does not specifically state what "all motions" include, the power to act on "all motions pending" has been interpreted to include the power to make findings of fact and conclusions of law. *Horizon Properties Corp. v. Martinez*, 513 S.W.2d 264, 266 (Tex. App. – El Paso 1974, writ ref'd n.r.e.). More important to the issue at hand, the words "all motions pending" have been interpreted to exclude the rendition of judgment when the

judge has heard no evidence in a non-jury trial. *Banks*, 783 S.W.2d at 786. In *Banks* there was no trial by jury, a visiting judge heard all the evidence, the regular judge who signed a final judgment heard no evidence, and there were no statement of facts of the hearing, findings of fact, or conclusions of law before the appeals court. *Banks*, 783 S.W.2d at 784.

Although appellant contends the Banks case is completely analogous to the present case, we disagree. In the present case, a two-week jury trial had been completed; the court reporter had finished the statement of facts prior to the death of Judge Burris; Judge Lee relied on the statement of facts; and, Judge Lee agreed to listen to each parties' characterization of the facts. At the hearing on the motion for severance and the motion to enter judgment, briefs had been provided to the judge, and Judge Lee stated:

> THE COURT: . . . I will rely on the Statement of Facts and I will listen to either side who wants to characterized the facts, but I will rely on the Statement- –

In *Texaco*, the court made the distinction between a bench trial and a jury trial for the purposes of rendition of a judgment. *Texaco*, 729 S.W.2d at 846-47. That is, in *Texaco*, the jury was the finder of facts, unlike a bench trial where the trial judge is the finder of fact. *Texaco* 729 S.W.2d at 846-47. Moreover, where a bench trial has taken place and the successor judge renders judgment "without a consideration of all the evidence adduced on the matter," the trial court has committed reversible error. *Texaco*, 729 S.W.2d at 846-47 (citing *Rutherford v. Rutherford*, 554 S.W.2d 829, 832 (Tex. Civ. App. – Amarillo 1977, no writ).

In the present case as in *Texaco*, the jury was the finder of facts. Although the successor judge in *Texaco* heard much of the evidence, he admitted in the charge conference that he had not read the entire evidence. *Texaco*, 729 S.W.2d at 847. The appeals court did find, however, that the successor judge did have "available to him a transcription of all the evidence adduced prior to his appointment to which he could refer for confirmation of relevant and material matters." *Texaco*, 729 S.W.2d at 847. Because all of the evidence in *Texaco* had been available to the successor judge, either through the judge's presence during the presentation of the evidence or through the court record, and the successor judge had properly present [sic] the applicable law which was supported by the evidence, the appeals court determined the trial judge had not abused his discretion.

Judge Lee in the present case, had the complete statement of facts available to him. The jury's findings, as well as the transcription of the evidence was also before him. He was able to determine whether sufficient evidence existed to support the jury findings. While Judge Lee was not present during any of the jury trial, he did have the completed statement of facts, each parties characterization of the facts through post-trial hearings, and the transcription of evidence supported by the jury's findings. Thus, like the *Texaco* case, this case presents a jury trial with a successor judge who did have "available to him a transcription of the evidence adduced prior to his appointment to which he could refer for confirmation of relevant and material matters." *Texaco*, 729 S.W.2d at 847. Appellant's reliance on *Banks* as an analogous case to the

present case is ill placed because the successor judge who rendered judgment in *Banks* heard no evidence.

Because the successor judge did rely on the statement of facts, was able to consider the evidence adduced in the matter, and the jury was the trier of fact, appellant's claim that the judge heard no evidence is without merit. Indeed, he heard the evidence which was presented to his predecessor, as well as evidence in post-trial briefs and hearings. We find there was no violation of the open courts provision, due course of law provision, or due process rights of Clyde Carter. U.S. CONST. amend. XIV; TEX.CONST. art. I, §§ 13 and 19.

Moreover, in the present case, the appellant failed to show any abuse of discretion or harm as a result of the successor judge's passing on the sufficiency of the evidence because this court of appeals is required to pass upon the sufficiency of the same evidence as present through the record. *Texaco*, 729 S.W.2d at 847 (citing *Brickman v. Herrin Transp. Co.*, 344 S.W.2d 953, 959 (Tex. Civ. App. – Houston 1961, no writ) (relying on TEX. R. CIV. P. 434 which has since been repealed but the same meaning is more recently encompassed in TEX. R. APP. P. 81). Relying on Rule 81 of the Texas Rules of Appellant [sic] Procedure as was done in *Texaco*, we find no denial of due process. We overrule appellant's second and third points of error.

STATUTE OF LIMITATIONS

Appellant's fourth point of error contend appellees' claims are barred by the statute of limitations. Appellant argues the cotrustees and non-trustee beneficiaries are

barred by both a two year statute of limitations and a four year statute of limitations. RESTATEMENT (SECOND) OF TRUSTS § 219 (1959).[3] There is no statute of limitations that expressly governs damage suits for breach of fiduciary duty. However, the trustee may not have the protection of a statute of limitations, depending on the basis of the action taken against him.

There is a fiduciary relation between trustee and beneficiary of a trust. *See Jewett v. Capital Nat'l Bank of Austin*, 618 S.W.2d 109, 112 (Tex. Civ. App. – Waco 1981, writ ref'd n.r.e.); RESTATEMENT (SECOND) OF TRUSTS § 10 (1959). The statute of limitations, in a fiduciary relation, does not begin to run until the trustee has clearly and openly repudiated the trust to the knowledge of the beneficiary. *Langford v. Shamburger*, 417 S.W.2d 438, 445 (Tex. Civ. App.–Fort Worth 1967, writ ref'd n.r.e.); *Winkler v. Craven*, 265 S.W.2d 191, 195 (Tex.Civ. App.–Waco 1954, ref'd n.r.e.). "Repudiating the trust" means a trustee must have given an account that shows all of the facts upon which the action might have been based or by reasonable diligence the beneficiaries should have discovered the repudiation of the trust. *See Oak Cliff Bank & Trust Co. v.*

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[3] **§ 219. Laches of the Beneficiary**

(1) The beneficiary cannot hold the trustee liable for a breach of trust if he fails to sue the trustee for the breach of trust for so long a time and under such circumstances that it would be inequitable to permit him to hold the trustee liable.

(2) The beneficiary is not barred merely by lapse of time from enforcing the trust, but if the trustee repudiates the trust to the knowledge of the beneficiary, the beneficiary may be barred by laches from enforcing the trust.

Steenbergen, 497 S.W.2d 489 (Tex. Civ. App –Waco 1973, ref'd n.r.e.); *Winkler*, 265 S.W.2d at 195. That is,

> 'The authorities are generally well agreed that for a trustee's repudiation of an express trust to be sufficient to set the statute of limitations in motion in his favor and against the beneficiary, the repudiation must be plain, strong, and unequivocal. . . . Generally, speaking, it must be an open repudiation, and to be sufficient and effective must have been brought home to the beneficiary.'

Langford, 417 S.W.2d at 445 (citing 54 A.L.R.2d, § 2 at p. 23).

Repudiation of a trust may be shown by acts inconsistent with an intent to carry out the trust, as well as by an express repudiation. *Hooper v. Courtney*, 256 S.W.2d 462, 466 (Tex. Civ. App. – Amarillo 1952, no writ). While the appellant and appellees argue whether a two or four year statute of limitation, as a matter of law, should apply, it must first be determined when a complete and full accounting[4] of the trustee's transactions took place and when appellant finally repudiated the trust. Moreover, it must also be determined when, by reasonable diligence, the beneficiaries should have discovered the repudiation of the trust. *Oak Cliff Bank*, 497 S.W.2d at 493; *Winkler*, 265 S.W.2d at 195.

We first address the standard of review for the matter of law point of error. When an appellant had the burden

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[4] A demand for accounting and the contents of the accounting are typically governed by statute. TEX. PROP. CODE ANN. §§ 113.151 AND 113.152 (VERNON 1984).

of proof on an adverse finding for an issue, the appellant "must demonstrate on appeal that the evidence conclusively established all vital facts in support of the issue." *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989). The reviewing court applies a two prong test. In the first prong the court examines the record for evidence which supports the finding, and all evidence to the contrary is ignored. *Sterner*, 767 S.W.2d at 690. When there is no evidence to support the finding, the reviewing court will then examine the entire record to determine if the contrary is established as a matter of law. *Sterner*, 767 S.W.2d at 690.

In the present case, appellant argues that Joe Carter should have discovered the facts giving rise to the claims against appellant more than four years prior to August 9, 1989. However, the jury heard evidence that although Joe had suspicions of appellant's mishandling of the trust prior to four year [sic] before August 9, 1989, Joe did not discover the mishandling until October 6, 1986. At that time, Joe and Steve Sampson visited the accountant's office and "realized there was a lot of wrong doing going on." There was evidence, moreover, that appellant refused on more than one occasion to reveal trust information and give an account to co-trustee. Applying the two pronged test, we find clearly that there was some evidence supporting the jury's finding. Consequently, the second prong of the "matter of law" test need not be applied since evidence did exist to support the jury finding. *Sterner*, 767 S.W.2d 690.

The question now becomes whether the two year statute of limitations or the four year statute of limitations applies. The same two prong test applies. First, we

examine the record for evidence that supports the finding, while ignoring all evidence to the contrary. *Sterner*, 767 S.W.2d at 690. Only if there is not evidence to support the finding, will the reviewing court examine the entire record to determine if the contrary proposition is established as a matter of law. *Sterner*, 767 S.W.2d at 690.

It is also important to note that on October 18, 1989, because no complete or true accounting had been given by appellant, the court appointed an auditor to render an accounting of the estate and the trust. The accounting took almost one year to complete. The court appointed auditors found 1,467 questionable transactions out of the 3,830 different items investigated. Due to the large quantity of time and fees already accrued, the auditors did not further investigate the 1,467 of questionable transactions. It was until the court ordered accounting was complete that the beneficiaries finally had a proper accounting or as good an accounting as the cost benefit would permit.[5] While appellant sought to terminate the trust in June of 1989, he did not, for purposes of this action, comply with the accounting demands of the beneficiaries until he was forced to do so by the October 1989 court order. That accounting or "agreed upon procedure" as specifically ordered by the court, was not furnished to the applicable parties until well into 1990. TEX. PROP. CODE ANN §§ 13.151 and 113.152 (Vernon 1984); *Winkler*, 265 S.W.2d at 195.

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[5] The testifying certified public accountant who performed the accounting stated that given the large number of work hours, the cost of the accounting, and the numerous questionable transactions, it would not be cost efficient to continue the questionable transactions.

However, in applying the first prong of the two prong test for matter of law points, we find for purposes of appellant's repudiation, there was some evidence that in October of 1986, Joe Carter should have had facts giving rise to appellant's breach of trust. While appellant contends there was evidence established to Joe's knowledge prior to that date, previous evidence was not apparent enough to Joe and the other co-trustees as to be "plain, strong and unequivocal" and "sufficient and effective" to "have been brought home to the beneficiary." *Langford,* 417 S.W.2d at 445. Joe's trip to the accountant in October of 1986 was finally the evidence that was sufficient, effective, plain, strong, and unequivocal enough to constitute the point when discovery should have taken place. Because appellant's prior refusals for accountings, as well as other factors such as Joe's educational level, the hundreds of miles between his home and the accountant's office, and the less than full report he received from the trust's attorney, we find there was evidence to support the jury's finding that the statute of limitations began to run in October 1986. Thus, we need not apply the second prong of test for a matter of law issue. *Sterner,* 767 S.W.2d at 690.

The conversion of trust property is a "special rule" and is governed by a four year statute of limitations rather than the usual two year statute of limitations for conversion. *Toro v. First City Bank-Westheimer Plaza, N.A.,* 821 S.W.2d 633, 635 (Tex. App. – Houston [1st Dist.] 1991, writ denied) (citing *Peek v. Berry,* 143 Tex. 294, 184 S.W.2d 272 (1944); *Hicks v. Hoover,* 422 S.W.2d 613 (Tex. Civ. App. – Waco 1967, writ ref'd)). The period of limitation to enforce a trust when there has been a breach of trust is

governed by the four year statute of limitation. *Graham v. Turner*, 472 S.W.2d 831, 836 (Tex. Civ. App. – Waco 1971, no writ) (citing the provision of Article 5529, Vernon's Ann. Civ. Statutes which has since been codified as TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (Vernon 1986), with no substantive variation from the article 5529). The current applicable statute reads:

> **§ 16.051. Residual Limitations Period**
>
> Every action for which there is no express limitations period, except an action for the recovery of real property, must be brought not later than four years after the day the cause of action accrues.

TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (Vernon 1986). The Texas Supreme Court in Peek poignantly stated,

> On question of limitation it must be recognized that this suit is an action primarily to declare and establish a trust, and when the same has been established, for recovery of the title to the trust property, both real and personal, and for damages for the conversion of the trust property. Actions such as this are not governed by the two-year statute of limitation. . . . The period of limitation applicable to suits to enforce a trust, is ordinarily governed either by the four-year statute of limitation prescribed for actions "other than for the recover [sic] of real estate, for which no limitation is otherwise prescribed,". . . .

Peek, 143 Tex. at 300-01, 184 S.W.2d at 275.

While appellant attempted to argue that *Peek* was distinguished from the present case, we find the court in *Peek* clearly established a four year statute of limitations

in breach of trust cases. Moreover, other courts have interpreted the court in *Peek* to have clearly intended a four year statute of limitations in breach of trust cases. *Toro*, 821 S.W.2d at 635; *Hicks*, 422 S.W.2d at 614.

We find that the four year statute of limitations applies in this breach of trust case as a matter of law. And, we find that the four statute of limitations had not run at the time appellees initiated their claim against appellant. We overrule appellants fourth point of error.

INSUFFICIENT EVIDENCE

In point of error five, appellant contends there was insufficient evidence to support the jury's finding that Joe Carter did not discover or should not have discovered facts rising from the claim until October 1986. Appellant claims the jury's finding is against the great weight and preponderance of the evidence; thus, the trial court erred in denying appellant's motion for new trial. Since appellant had the burden of proof when he asserted that the statute of limitations barred appellees claim, we apply the standard of review for against the great weight and preponderance of the evidence. *Hickey v. Couchman*, 797 S.W.2d 103, 109 (Tex. App. – Corpus Christi 1990, writ denied). As the reviewing court, we must examine the record to determine if there is some evidence to support the finding, whether the finding is so contrary to the overwhelming weight and preponderance of the evidence as to be clearly wrong and manifestly unjust, or whether the great preponderance of the evidence supports its nonexistence. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). We find there was evidence to support the jury's finding

that Joe Carter did not or should not have discovered facts giving rise to the claim against appellant until October 1986.

The jury was presented with considerable evidence to support their findings. First, Joe Carter testified to the following: 1) he lived in Tyler, a considerable distance from the San Antonio Trust offices, 2) he had only a sixtn grade education and was employed as a bus driver, 3) his attorney was receiving detailed information about the trust until Joe became co-trustee at which time the information stopped, 4) appellant provided no receipts to Joe regarding appellant's reimbursement for trust-related expenses; therefore, Joe had no information on which to challenge appellant's conduct, 5) Joe had no detailed information of the trust and estate, 6) Joe did not know appellant had the trust pay for appellant's personal expenses on the *Visa* charge card bill, 7) the accounting information Joe received from the primary attorneys for trust was less than informative, 8) Joe trusted appellant who was his brother and had a better education than Joe, 9) Joe requested receipts prior to signing trust checks, but appellant did not provide receipts, 10) Joe requested that the trust pay for an attorney to represent Joe and Doris Corum to investigate the matters of the trust, but appellant refused to allow the trust pay for the attorney, 11) Joe and Doris Corum, individually, finally hired and paid for an attorney to investigate matters of the trust, 12) and Joe first realized there were things wrong with the trust when he first traveled to San Antonio to review the trust records in October 1986.

Additional evidence included testimony by Elwood Cluck, one of the primary attorneys representing the

trust. Cluck reluctantly admitted that he provided less detailed information concerning the financial affairs of the trust to the co-trustees and beneficiaries than he did to appellant. Specifically, Cluck send out two separate letters of information. One letter, three pages long, was sent to appellant detailing appellant's expenditures for the trust and stating that the general expenditures of the trust for the year "consist almost entirely of [appellant's] credit card expenses." The other letter was sent to beneficiaries. That letter, three paragraphs long, was sent to beneficiaries and merely stated the sum total of trust expenditures for the year. Moreover, Cluck testified that he had not segregated bills so appellant's personal work appeared to be work for the trust and, therefore, was billed to the trust. Consequently, the co-trustees and beneficiaries were unable to determine which portions of the bill were for work rendered for appellant and not for the trust.

Clearly, there is more than just some evidence to support the jury's finding that Joe and the beneficiaries did not discover and should not have discovered the facts giving rise to the claim against appellant. Appellant asserts that Joe Carter was a co-trustee and signed reimbursement checks for appellant, thus, creating a presumption of Joe's knowledge of Clyde's expenditures. Moreover, appellant argues that Joe wrote a letter to Clyde on November 10, 1985, which served as evidence of Joe's knowledge as to what Clyde was doing with the trust. Appellant contends that the letter stating that Joe would no longer sign reimbursement checks to Clyde, coupled with Joe's earlier voice of discontentment is evidence of Joe's knowledge of Clyde's handling of the trust,

at least as of November 10, 1985. The letter reads as follows:

> 11, 10 1985
>
> Hi Clyde
>
> Dorise [sic] and Neal Said not to Sing [sic] check for cash Neal Said he thought you have Estate Settle By Jan 15 1986 [sic]
>
> Joe

Explaining why he wrote the letter, Joe testified that he understood from Neal that Clyde was to close the Estate in January 1986, and that Clyde was not providing receipts for the money he was spending from the trust. That evidence does not constitute enough evidence to make the jury's finding against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *Cain*, 709 S.W.2d at 176.

Appellant's fifth point of error argument further asserts that the trial judge erred in denying appellant's motion for new trial. The granting or denial of a motion for new trial is addressed to the sound discretion of the trial court and the trial court's action will not be disturbed on appeal absent an abuse of discretion. *Strackbein v. Prewitt*, 671 S.W.2d 37, 39 (Tex. 1984). Since the findings of the jury where based on evidence which was not against the overwhelming weight and preponderance of the evidence, the trial court did not abuse its discretion by denying appellant's motion for new trial. *Strackbein*, 671 S.W.2d at 39. We overrule appellant's fifth point of error.

ACTUAL DAMAGES

Appellant's sixth point of error contends the jury's award of $7 million actual damages is excessive. Claiming there is no evidence to support actual damages in excess of $3,319,747.14, appellant argues the trial court erred in denying appellant's second amended motion for judgment non obstante veredicto and in overruling his motion for new trial. It appears that appellant, through a parenthetic expression within this same no evidence point of error, is also arguing a factual insufficiency point. We first address the no evidence point.

Relying on the current pre-judgment statute, appellant asserts that ~~the~~ judgment awarded $3,681,252.86 in prejudgment interest, but the maximum allowable amount under the statute is $700,122.50. TEX. REV. CIV. STAT. ANN. art. 5069-1.05, § 6 (Vernon 1993).

> **Art. 5069-1.05. Rate of judgments**
>
> . . .
>
> Sec. 6. (a) Judgments in wrongful death, personal injury, and property damage cases must include prejudgment interest. Except as provided by Subsections (b), (c), and (d) of this section, prejudgment interest accrues on the amount of the judgment during the period beginning on the 180th day after the date the defendant receives written notice of a claim or on the day the suit is filed, whichever occurs first, and ending on the day preceding the date judgment is rendered.
>
> (b) If judgment for a claimant is less than the amount of a settlement offer by the defendant, prejudgment interest does not accrue on

the amount of the judgment for the period during which the offer may be accepted.

(c) If judgment for a claimant is more than the amount of the settlement offer by the defendant, prejudgment interest does not include prejudgment interest on the amount of the settlement offer for the period during which the offer may be accepted.

(d) In addition to the exceptions provided under Subsections (b) and (c) of this section, the court in its discretion may order that prejudgment interest does or does not accrue during periods of delay in the trial, taking into consideration:

(1) periods of delay caused by a defendant; and

(2) periods of delay caused by a claimant.

(e) In order for a settlement offer to toll the running of prejudgment interest in accordance with the provisions of this section, the offer must be communicated to a party or his attorney or representative writing.

(f) If a settlement offer is made for other than present cash payment at the time of settlement, prejudgment interest on the amount of the settlement offer at the time it is made.

(g) The rate of prejudgment interest shall be the same as the rate of postjudgment interest at the time of judgment and shall be computed as simple interest.

TEX. CIV. PRAC. & REM. CODE ANN. art. 5069-1.05, § 6 (Vernon 1993). While appellant relies on the statutory

limitations for pre-judgment interest, he fails to acknowledge the additional responsibility of a fiduciary.

> Section 114.001. Liability of Trustee to Beneficiary
>
> . . .
>
> (c) A trustee who commits a breach of trust is chargeable with any damages resulting from such breach of trust, including but not limited to:
>
> (1) any loss of depreciation in value of the trust estate as a result of the breach of trust;
>
> (2) any profit made by the trustee through the breach of trust; or
>
> (3) any profit that would have accrued to the trust estate if there had been no breach of trust.

TEX. PROP. & CODE ANN. § 114.001(c) (Vernon 1984). Clearly, "any profit that would have accrued to the trust estate if there had been no breach of trust," can mean more than just the statutory prejudgment interest. TEX. REV. CIV. STAT. ANN. art 5069-1.05, § 6 (Vernon 1993). The rate of return on the trust funds, coupled with the safety of those funds, is necessary to calculating what profits the trust funds would have returned in a breach of contract. *See Humane Soc'y of Austin and Travis County v. Austin Nat'l Bank*, 531 S.W. 574, 580 (Tex. 1975).

A loss of profits in trust property, caused by a trustee's breach of fiduciary duty, results in damages in the amount of profit which would have accrued but for the breach. *Slay v. Burnett Trust*, 187 S.W.2d.377, 393 (Tex. 1945); *Langford*, 417 S.W.2d at 445; TEX. CIV. PROP. CODE

ANN. 114.001(c) (Vernon 1984). To hold otherwise, is to allow a trustee who breaches his responsibility to deprive the beneficiaries of the trust profits which could have been made from investments yielding high interest. At the same time the trustee would only be liable for the statutory amount which is currently ten percent. This inequity in trust profits is specifically rejected in the Trust Code. TEX. PROP. CODE ANN. 114.001(c) (Vernon 1984).

In a suit against a trustee for breach of fiduciary duty, interest made from investments is not pre-judgment interest, but an element of damages for the trust's lost use of the money allegedly misappropriated. TEX. PROP. CODE ANN. § 114.001(c) (Vernon 1984); *Holloway v. Int'l Bankers Life Ins. Co.*, 354 S.W.2d 198, 213 (Tex. Civ. App. – Fort Worth 1962), *rev'd on other grounds*, 368 S.W.2d 567 (Tex. 1963). Thus, more than the statutory amount for prejudgment interest can be applicable, as in this case, where a higher than statutory interest of "profit would have accrued to the trust estate if there had been no breach of trust." TEX. PROP. CODE ANN. § 114.001(c) (Vernon 1984).

Appellant argues that there is no evidence to support actual damages in excess of $3,319,7477.14 [sic]. The evidence presented at trial, however, reveals that there was evidence to support the finding of damages of $3,681,252.86 for which the appellant now complains. The evidence presented at trial included: 1) a computer printout of items and interest from 1974 through 1990, 2) evidence of appellant's use of trust funds to pay for personal living expenses, personal legal work, and personal accounting work, 3) evidence that appellant usurped an estate business opportunity netting a profit in

excess of $440,000.00 for himself, 4) evidence that appellant made as high as 13% interest in certificate of deposits from the $440,000.00 profit, 5) evidence that there were not enough funds available after appellant took his $1.45 million in fees and claims, 6) evidence that the prime interest rate on loans during the time period was between 8 percent and 15 and 3/4 percent, and 7) evidence that the expert preparing the summary of the total loss to the estate trust used a reasonable 10 percent factor. Clearly, there was evidence to support the jury's finding. We overrule appellant's sixth point of error.

EXEMPLARY DAMAGES

Appellant's seventh and final point of error contends the exemplary damage award is unconstitutional. Appellant argues that under the Fourteenth Amendment of the United States Constitution and under the due course of law provisions of Article 1, Sections 13 and 19, of the Texas Constitution, the award is infirm. Claiming there is a lack of guidance in jury instructions for exemplary damages, appellant argues that in Texas "the jury's determination is an arbitrary process without any objective standards." *State Farm Mut. Auto. Ins. Co. v. Zubiate*, 808 S.W.2d 590 (Tex. App. – El Paso 1991, writ denied). The appellant claims that because the procedures and methods by which exemplary damages in Jury Question 5 are unconstitutional, the trial court erred in not granting appellant's second amended motion for judgment non obstante veredicto or in not disregarding Question 5.

Appellant's objection to Jury Question 5 was stated in complete as follows: "Question Number 5 is objected

to on the grounds that there are no pleadings or evidence to support the submission of such issue. Further, that legally, exemplary damages should not be awarded under the evidence as presented in this case." Within appellant's objection there is no specific objection as to the unconstitutionality of the jury question for exemplary damages. Yet, on appeal appellant specifically raises the constitutionality issue.

> **Rule 274. Objections and Requests**
>
> A party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection. Any complaint as to a question, definition, or instruction, on account of any defect, omission, or fault in pleading, **is waived unless specifically included in the objections.** . . .

Tex. R. Civ. P. 274. The purpose of Rule 274 is to provide the trial court with the opportunity to make corrections of errors in the charge. *Castleberry v. Branscum*, 721 S.W.2d 270, 276 (Tex. 1986). When the objections do not clearly state the grounds, the trial court is denied the opportunity to correct the mistake, and the requisites of Rule 274 are not met for appeal purposes. *Wilgus v. Bond*, 730 S.W.2d 670, 672 (Tex. 1987).

In the present case, the appellant made no constitutional objection to the jury question on exemplary damages to preserve his error. *General Chemical Corp. v. De La Lastra*, 815 S.W.2d 750, 760 (Tex. App. – Corpus Christi 1991, writ granted) (*rev'd in part on other grounds*, 852 S.W.2d 916, 919 (Tex. 1993) (choice of law arguments are waivable)). Consequently, we are unable to review appellant's final point or error, and it is overruled. Tex. R. Civ.

P. 272 and 274. Similarly, appellees David and Anita failed to preserve their point of error. The record before this court does not reveal an objection or a complaint as to the exemplary damage award at any time at the trial level. Because the record does not reveal an objection on the issue, we are unable to address appellees David and Anita's reply point on exemplary damages which has been waived. *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982).

TRUST TERMINATION

David and Anita's cross points assert the trial court erred in overruling their motion for judgment declaring termination of the trust and in overruling their objection to the rendition of the judgment. David and Anita contend that at the time of submission of the case to the jury, all the parties' live pleadings on file pleaded for termination of the trust. If co-appellees wanted to change their pleadings, they could have moved for leave of court to amend their pleadings prior to the entry of judgment. David and Anita argue that it was too late for co-appellees to change their position at the hearing on entry of judgment. As a result, David and Anita objected to the entry of judgment proposed by the co-appellees for the reason that it did not order termination of the trust.

Supporting their argument for termination, David and Anita assert four general reasons for termination of the trust. First, they aver the trust itself stipulates the

terms of termination and those terms have been met.[6] Second, David and Anita contend that to completely deny termination now is not judicially economical. Third, they argue that in light of the appellant's insolvency, it is not inequitable for David and Anita to request an order terminating the trust. Moreover, they claim the duration of the trust was not intended to last until the beneficiaries' disputes and claims against each other were paid.

Co-appellees who initially pleaded for termination argue that their belief that all debts and taxes of the Estate had been paid, a condition precedent, turned out to be incorrect. Even as appellant's pleadings revealed, several claims against the Estate were still pending. Co-appellees further argue that the pleadings simply stated what the parties believed to be true and did not constitute judicial admissions. If the pleadings are contrary to the true state of the facts, they are not held as true legal conclusions or judicial admissions. *See Motor Inv. Co. v. City Hamlin*, 179 S.W.2d 278. 282 (Tex. 1944). The belief that the terms for terminating the trust had been met were erroneous as later reveal [sic] through the evidence.

---

[6] The specific termination clause of the trust in question reads:

> This Trust shall terminate upon the expiration of one (1) calendar year following full, final, and complete settlement, payment, satisfaction and discharge of all debts, claims, and taxes, including income, gift and estate and inheritance taxes, and penalties and interest thereon, if any, assessed and asserted against the Estate of HARRY LEE CARTER, Deceased, and/or the Beneficiaries thereof.

A claim against a beneficiary, which was an expressed condition precedent, remained.

The claims that the condition precedents had been met for termination of the trust were not binding. *See Motor Inv. Co.*, 179 S.W.2d at 282. The evidence presented at trial without objection established the purpose of the trust had not been completely fulfilled. Consequently, the trial court did not error [sic] in refusing to terminate the trust. We overrule appellees David and Anita's cross points on trust termination and their objection to the rendition of the judgment.

Accordingly, we affirm the judgment of trial court.

ORLANDO GARCIA

Justice

DO NOT PUBLISH

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515 Busby Drive
San Antonio, TX 78209

Mr. Timothy Bryan Smith
Smith Neal & Karam
Trinity Plaza II
745 E. Mulberry, Suite 490
San Antonio, TX 78212

RE: Case No. D-4587
Style: CLYDE T. CARTER
v. HARRY LEE CARTER ESTATE MANAGEMENT TRUST ET AL.

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation "Writ Denied".

Respectfully yours,

JOHN T. ADAMS, CLERK

BY: /s/ Michael C. Murphey
Michael C. Murphey,
Deputy Clerk

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

June 8, 1994

Mr. Michael A. Hatchell
Ramey & Flock
P.O. Box 629
500 First City Place
Tyler, TX 75710

Ms. Molly H. Anderson
Ramey & Flock
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Mr. C. Adam Morriss, III
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Mr. Robert E. Golden
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Ms. Joyce W. Moore
Joyce W. Moore
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The Honorable Franklin S. Spears
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THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

RE: Case No. D-4587

Style: CLYDE T. CARTER
v. HARRY LEE CARTER ESTATE MANAGEMENT TRUST ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case. Respondent's motion for extension of time to file response to motion for rehearing is dismissed as moot.

Respectfully yours,

JOHN T. ADAMS, CLERK

BY: /s/ Michael C. Murphey
Michael C. Murphey,
Deputy Clerk

No. 146,155

THE ESTATE OF	§	PENDING IN THE
HARRY LEE CARTER,	§	PROBATE COURT NO. 2
DECEASED	§	BEXAR COUNTY, TEXAS
	§	

JUDGMENT

On the 4th day of February, 1991, came on to be heard the above-styled and numbered cause. CLYDE T. CARTER, Petitioner and Counter-Defendant, appearing individually, and as Co-Trustee of the Harry Lee Carter Estate Management Trust ("the Trust") and as Co-Independent Executor of the Estate of Harry Lee Carter, Deceased ("the Estate"), whose residence address is 1807 Roseberry Drive, Scottsboro, Alabama, and whose Social Security Number is 230-22-5625, appeared in person and by attorney of record, and announced ready for trial. JOE CARTER, appearing individually and as Co-Trustee of the Trust, JOETTE CARTER, CRYSTAL JONES, EDWARD M. RIGSBY, NEIL CORUM, and MICHAEL CORUM, BLANCHE CARTER MARTIN, MOLLIE MARTIN CANNON, and JOHN CARTER MARTIN, all Respondents and Counter-Claimants, appeared in person and by attorney of record and announced ready for trial. ANITA FRANCES CARTER and DAVID ALLAN CARTER, Respondents, appeared in person and by attorney of record and announced ready for trial. DORIS CARTER CORUM, Individually and as Co-Independent Executor of the Estate and Co-Trustee of the Trust, and GRACE CARTER, individually, Respondents and Counter-Claimants, although unable to appear in person due to health

reasons, appeared by attorney of record and announced ready for trial. A jury having been previously demanded, a jury consisting of twelve jurors was empaneled. It came to the Court's attention shortly after the commencement of the testimony, however, that one of the jurors was not qualified to sit on the case. By the agreement of all the parties, that juror was dismissed, and the case proceeded to trial with eleven good and lawful jurors.

At the conclusion of the evidence, and after hearing the argument of counsel, the Court submitted the case to the jury on twenty-three questions. On February 15, 1991, the jury returned its verdict. A true and correct copy of the Charge of the Court, including the questions and the verdict of the jury, is attached hereto as Exhibit "A" and is hereby incorporated hereby by reference for all purposes as if set forth verbatim.

Based on the jury verdict and on the applicable provisions of Texas law, it is HEREBY ORDERED THAT JUDGMENT IS ENTERED AS FOLLOWS:

1. The HARRY LEE CARTER ESTATE MANAGEMENT TRUST ("the Trust") shall have and recover judgment against CLYDE T. CARTER, individually, in the following amounts:

(a) The sum of Seven Million and No/100 Dollars ($7,000,000.00), as actual damages for breach of fiduciary duty under common law and pursuant to TEX. PROP. CODE ANN. § 114.001 (c) and § 114.031(a)(1),(3) and (4);

(b) The sum of One Hundred Fifty-One Thousand Nine Hundred Sixty-Two and 50/100 Dollars ($151,962.50), which is hereby taxed as costs pursuant to Texas Rule of Civil Procedure

172 against CLYDE T. CARTER, individually, as reimbursement for reasonable charges previously paid by the Trust to the Court-appointed Auditor in this case;

(c) The sum of One Million and No/100 Dollars (1,000,000.00), pursuant to Texas Property Code § 114.061(b) and Texas Probate Code § 241(a)(1), as a forfeiture of fiduciary fees previously received by CLYDE T. CARTER; and

(d) Post judgment interest on all amounts awarded in this Paragraph 1 herein at the rate of 10% per annum from date of entry of this judgment until fully paid.

It is further ORDERED, ADJUDGED, and DECREED that, pursuant to Texas Property Code § 114.031(b), the Co-Trustees of the Trust are hereby expressly authorized, empowered, and directed to offset the total amount of the judgment awarded to the Trust against CLYDE T. CARTER in this Paragraph 1 against the interest of CLYDE T. CARTER in the Trust, both legal and equitable, income and principal, individually and as a grantor and beneficiary of the Harry Lee Carter Estate Management Trust, until such time as this judgment against CLYDE T. CARTER shall have been paid in full by virtue of said offset or otherwise.

2. The HARRY LEE CARTER ESTATE MANAGEMENT TRUST ("the Trust") shall have and recover judgment against DORIS CARTER CORUM, individually as follows:

(a) The sum of Seventy-Four Thousand Nine Hundred Twelve and No/100 Dollars

($74,912.00), pursuant to Texas Property Code § 114.031(a)(4); and

(b) Post judgment interest on all amounts awarded in paragraph 2(a) herein at the rate of 10% per annum from date of entry of this judgment until fully paid.

It is further ORDERED, ADJUDGED, and DECREED that, pursuant to Texas Property Code § 114.031(b), the Co-Trustees of the Trust are hereby expressly authorized, empowered and directed to offset the total amount of the judgment awarded to the Trust (against DORIS CARTER CORUM in this Paragraph 2 against the interest of DORIS CARTER CORUM in the Trust, both legal and equitable, income and principal, individually and as a grantor and beneficiary of the Harry Lee Carter Estate Management Trust, until such time as this judgment against DORIS CARTER CORUM shall have been paid in full by virtue of said offset or otherwise.

3. The HARRY LEE CARTER ESTATE MANAGEMENT TRUST ("the Trust") shall have and recover judgment against JOE CARTER, individually as follows:

(a) The sum of Three Thousand Nine Hundred Sixty-Five and No/100 Dollars ($3,965.00), pursuant to Texas Property Code § 114.031 a)(4); and

(b) Post judgment interest on all amounts awarded in Paragraph 3(a) herein at the rate of 10% per annum from date of entry of this judgment until fully paid.

It is further ORDERED, ADJUDGED, and DECREED that, pursuant to Texas Property

Code § 114.031(b), the Co-Trustees of the Trust are hereby expressly authorized, empowered and directed to offset the total amount of the judgment awarded to the Trust against JOE CARTER in this Paragraph 3 against the interest of JOE CARTER in the Trust, both legal and equitable, income and principal, individually and as a grantor and beneficiary of the Harry Lee Carter Estate Management Trust, until such time as this judgment against JOE CARTER shall have been paid in full by virtue of said offset or otherwise.

4. The HARRY LEE CARTER ESTATE MANAGEMENT TRUST ("the Trust") shall have and recover judgment against DAVID ALLEN CARTER, individually as follows:

(a) The sum of One Thousand Nine Hundred and No/100 Dollars ($1,900.00), pursuant to Texas Property Code § 114.031(a) (4); and

(b) Post judgment interest on all amounts awarded in Paragraph 4(a) herein at the rate of 10% per annum from date of entry of this judgment until fully paid.

It is further ORDERED, ADJUDGED, and DECREED that, pursuant to Texas Property Code § 114.031(b), the Co-Trustees of the Trust are hereby expressly authorized, empowered, and directed to offset the total amount of the judgment awarded to the Trust against DAVID ALLAN CARTER in this Paragraph 4 against the interest of DAVID ALLAN CARTER in the Trust, both legal and equitable, income and principal, individually and as a grantor and beneficiary of the Harry Lee Carter Estate Management Trust, until such time as this judgment against DAVID

ALLAN CARTER shall have been paid in full by virtue of said offset or otherwise.

5. It is further ORDERED, ADJUDGED, and DECREED that each of the individuals listed below shall have and recover judgment against CLYDE T. CARTER, individually, for exemplary damages as found by the jury in the following amounts:

a.	BLANCHE CARTER MARTIN	$93,750.00
b.	MOLLIE MARTIN CANNON	$93,750.00
c.	JOHN CARTER-MARTIN	$93,750.00
d.	JOETTE LEE CARTER	$93,750.00
e.	EDWARD M. RIGSBY	$59,375.00
f.	CRYSTAL JONES	$93,750.00
g.	GRACE CARTER	$59,375.00
h.	JOE CARTER	$93,750.00
i.	MICHAEL LEE CORUM	$162,500.00
j.	NEIL CORUM	$93,750.00
k.	DORIS CARTER CORUM	$162,500.00

6. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the JOE CARTER FAMILY GROUP (being comprised of JOE CARTER, GRACE CARTER, JOETTE CARTER, CRYSTAL JONES, and EDWARD M. RIGSBY) and the DORIS CARTER CORUM FAMILY GROUP (being comprised of DORIS CARTER CORUM, MICHAEL CORUM, and NEIL CORUM), shall, jointly and equally, have and recover judgment against CLYDE T. CARTER, individually, in the amount of Four Hundred Eighty Thousand and No/100 Dollars ($480,000.00) through the trial of this cause; the further sum of Fifty Thousand and No/100 Dollars ($50,000.00) in the event of an appeal to the Court of Appeals; the further sum of Twenty-Five Thousand and No/100 Dollars ($25,000.00) in the event of an application for writ of error to the Supreme Court of

Texas; and the further sum of Fifteen Thousand and No/100 Dollars ($15,000.00) in the event that the application for writ of error is granted, for reasonable and necessary attorney's fees, awarded and taxed hereby against CLYDE T. CARTER as costs, pursuant to Texas Property Code § 114.064(a).

7. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the BLANCHE CARTER MARTIN FAMILY GROUP (being comprised of BLANCHE CARTER MARTIN, MOLLIE MARTIN CANNON, and JOHN CARTER MARTIN), have and recover judgment against CLYDE T. CARTER, individually, in the amount of Three Hundred Seventy-Five Thousand and No/100 Dollars ($375,000.00) through the trial of this cause; the further sum of Fifty Thousand and No/100 Dollars ($50,000.00) in the event of an appeal to the Court of Appeals; the further sum of Twenty-Five Thousand and No/100 Dollars ($25,000.00) in the event of an application for writ of error to the Supreme Court of Texas; and the further sum of Fifteen Thousand and No/100 Dollars ($15,000.00) in the event that the application for writ of error is granted, for reasonable and necessary attorney's fees, awarded and taxed hereby against CLYDE T. CARTER as costs, pursuant to Texas Property Code § 114.064(a).

8. It is further ORDERED, ADJUDGED, AND DECREED that the amounts awarded herein in Paragraphs 5, 6, and 7 shall bear post-judgment interest at the rate of ten percent (10%) per annum from date of entry until paid.

9. It is further ORDERED, ADJUDGED, AND DECREED that the claim of CLYDE T. CARTER for compensation as Trustee of the HARRY LEE CARTER ESTATE MANAGEMENT TRUST is hereby in all respects denied pursuant to TEX. PROP. CODE ANN. § 114.061(b).

10. All other costs of Court expended or incurred in this cause are hereby taxed as costs and adjudged against CLYDE T. CARTER pursuant to TEX. PROP. CODE ANN. § 114.064(a).

11. All writs and processes for the enforcement and collection of this Judgment or the costs of court shall issue as necessary.

12. The Court specifically notes that certain claims for non-monetary relief against CLYDE T. CARTER have been severed from this cause and continued on this Court's docket under Cause No. 146,155-A, as set forth in this Court's Order dated September 19. All other relief not expressly granted herein is hereby denied.

SIGNED this 19th day of September, 1991.

/s/ Robert G. Lee
JUDGE PRESIDING

APPROVED AS TO FORM:

GARZA, MOORE & LAZOR, P.C.
2400 NCNB Plaza
300 Convent Street
San Antonio, TX 78205
(512) 225-2400
(512) 225-7402 (Facsimile)

By: /s/ Joyce W. Moore
Joyce W. Moore
Texas Bar No. 14357400

By: /s/ Robert E. Golden
Robert E. Golden
Texas Bar No. 08085560

ATTORNEYS FOR DORIS CARTER CORUM, Individually and as Co-Indepenaent Executrix of the Estate of Harry Lee Carter Deceased, and Co-Trustee of the Harry Lee Carter Estate Management Trust, JOE CARTER, Individually and as Co-Trustee of the Harry Lee Carter Estate Management Trust, GRACE CARTER, JOETTE CARTER, CRYSTAL JONES, EDWARD M. RIGSBY, MICHAEL CORUM, NEIL CORUM, BLANCHE CARTER MARTIN, MOLLIE MARTIN CANNON, and JOHN CARTER MARTIN

EXHIBIT A

CAUSE NO. 146,155

THE ESTATE OF	§	PENDING IN THE
HARRY LEE CARTER	§	PROBATE COURT NO. 2
DECEASED	§	BEXAR COUNTY, TEXAS
	§	TMS 15 OF Feb. 1991

CHARGE OF THE COURT

MEMBERS OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this Charge. In discharging

your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1.

Do not let bias, prejudice or sympathy play any part in your deliberations.

2.

In arriving at your answers, consider only the evidence introduced here under oath, under the rulings of the court that is, what you have seen and heard in this Courtroom – together with the law as given you by the Court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3.

Since every answer that is required by the Charge is important, no juror should state or consider that any required answer is not important.

4.

You must not decide who you think should win and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5.

You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6.

You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the Presiding Juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

7.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the Judge. If it should be found that you have disregarded any of the instructions, it will be jury misconduct and it may require another trial by

another jury. If that happens, all of our time will have been wasted.

8.

The Presiding Juror or any other juror who observes a violation of the Court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

9.

When words are used in this Charge in a sense that varies from their commonly understood meaning, you are given a proper legal definition, which you must accept in place of any other meaning.

10.

Answer "Yes" or "No" unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No". Whenever a question requires other than a "Yes" or "No" answer, your answer must be based on a preponderance of the evidence.

"Preponderance of the Evidence" means the greater weight and degree of credible testimony or evidence introduced before you and admitted in this case.

"Trust" means the HARRY LEE CARTER ESTATE MANAGEMENT TRUST and includes all fourteen (14) individual trusts established by the following parties:

Doris Carter Corum, Michael Lee Corum, Neil Corum, Clyde T. Carter, David Carter, Anita Carter, Joe Carter, Grace Carter, Joette Lee Carter, Edward M. Rigsby, Crystal Jones, Blanche Carter Martin, Mollie M. Cannon, and John Carter Martin.

"Executor" means a person acting as a personal representative of the estate of a deceased individual, and in this charge the term "Executor" means and includes those persons acting as a temporary or permanent administrator of the Estate as well as an Independent Executor of the Estate.

"Fiduciary duty" means the duty of a trustee to manage the trust property in accordance with the provisions of the Trust Agreement, and in connection with such management, to exercise the highest degree of honesty and fair dealing; to act with the utmost good faith for the sole benefit of the Trust; to make full disclosure of all material facts to the beneficiaries of the Trust; and to exercise the same degree of care, prudence, and diligence as an ordinarily prudent and careful person would exercise in the management of his own affairs. A trustee also has a fiduciary duty to maintain adequate records to support all trust expenditures and to make a full accounting of all funds belonging to the trust. The trustee has the burden of producing evidence to establish that all money spent was for the benefit of the trust and, in the absence of such evidence any unsupported expenditures of funds from the trust should be reimbursed to the trust by the trustee. An executor owes the same fiduciary duties as a Trustee in connection with his management of an estate.

"Proximate Cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred; and in order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

"Exemplary Damages" means an amount which you may, in your discretion, award as an example to others and as a penalty or by way of punishment. Exemplary damages or punitive damages may be awarded in addition to any amount which may be or has been found by you as actual damages.

"Waiver" means the intentional surrender of a known right or intentional conduct inconsistent with claiming that right if made after receipt of full disclosure of all material information.

A person is *"estopped"* if, after full disclosure of all material facts, he acts or fails to act with the intention that another rely on such action or inaction, and if such other person does in good faith rely to his detriment on the acts or inactions of the first person.

"Negligence" means failure to use ordinary care; that is, failure to do that which a person of ordinary prudence would have done under the same or similar circumstances, or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.

QUESTION NUMBER 1

Do you find that CLYDE T. CARTER breached his fiduciary duty as Executor/Trustee?

Answer "Yes" or "No"

We, the Jury, answer:- YES

If you have answered Question Number 1 "Yes", then answer Question Number 2; otherwise, do not answer Question Number 2.

QUESTION NUMBER 2

Do you find that such breach of fiduciary duty, if any, by CLYDE T. CARTER was a proximate cause of monetary loss, if any, to the Trust?

Answer "Yes" or "No"

We, the Jury, answer: YES

If you have answered Question Number 2 "Yes", then answer Question Number 3; otherwise, do not answer Question Number 3.

QUESTION NUMBER 3

Find the amount of monetary loss, if any, to the Trust proximately resulting from the breach of fiduciary duty, if any, by CLYDE T. CARTER.

Answer in dollars and cents, if any:

We, the jury, answer: $7,000,000.00

If you have answered Question Number 1 "Yes", then answer Question Number 4; otherwise, do not answer Question Number 4.

QUESTION NUMBER 4

Do you find that CLYDE T. CARTER breached his fiduciary duty as Executor/Trustee willfully or with reckless disregard for the rights of the beneficiaries of the Trust?

Answer "Yes" or "No"

We, the jury, answer: YES

If you answered Question Number 4 "Yes", then answer Question Number 5; otherwise, do not answer Question Number 5.

QUESTION NUMBER 5

What amount of money, if any, do you find should be assessed against CLYDE T. CARTER as exemplary damages for the benefit of the following people:

Answer in dollars and cents, if any, beside each name.

We, the Jury, answer:

$ 93,750.00 Blanche Carter Martin
$ 93,750.00 Mollie Martin Cannon
$ 93,750.00 John Carter Martin
$ 93,750.00 Joette Lee Carter
$ 59,375.00 Edward M. Rigsby
$ 93,750.00 Crystal Jones
$ 59,375.00 Grace Carter

$ 93,750.00 Joe Carter
$162,500.00 Michael Lee Corum
$ 93,750.00 Neil Corum
$162,500.00 Doris Carter Corum

If you answered Question Number 1 "Yes", then answer Question Number 6; otherwise, do not answer Question Number 6.

QUESTION NUMBER 6

Do you find that any of the Co-Trustees knowingly joined in or consented to the breach of fiduciary duty, if any, by CLYDE T. CARTER as Executor/Trustee?

Answer by writing "Yes" or "No" beside each name.

We, the jury, answer: NO Joe Carter
NO Doris Carter Corum
NO Blanche Carter Martin

If you have answered Question Number 6 "yes" beside any name, then, as to those names only, answer Question Number 7; otherwise do not answer Question Number 7.

QUESTION NUMBER 7

Do you find that such joining in or consenting to the breach of fiduciary duty, if any, by CLYDE T. CARTER as a Trustee was a proximate cause of monetary loss, if any, to the Trust?

Answer by writing "Yes" or "No" beside each name.

We, the jury, answer: NO Joe Carter
NO Doris Carter Corum
NO Blanche Carter Martin

If you have answered Question Number 7 "yes" beside any name, then, as to those names only, answer Question Number 8; otherwise do not answer Question Number 8.

QUESTION NUMBER 8

Find the monetary loss, if any, to the Trust, resulting, from the joinder or consent to the breach of fiduciary duty, if any, by CLYDE T. CARTER as a Trustee, by each of the following:

You are instructed in connection with this question not to include any amounts for monetary losses, if any, to the Trust resulting from the acts or conduct of CLYDE T. CARTER occurring either before or after each of the named individuals was serving as a Co-Trustee of the Trust.

Answer in dollars and cents, if any, beside each name.

We, the jury, answer: ___ Joe Carter
___ Doris Carter Corum
___ Blanche Carter Martin

If you have answered Question Number 1 "Yes", then answer Question Number 9; otherwise, do not answer Question Number 9.

QUESTION NUMBER 9

Do you find that DORIS CARTER CORUM, as Co-Executor, knowingly joined in or consented to the breach of fiduciary duty, if any, by CLYDE T. CARTER as a Co-Executor?

Answer "Yes" or "No"

We, the Jury, answer: NO

If you have answered Question Number 9 "Yes", then answer Question Number 10; otherwise, do not answer Question Number 10.

QUESTION NUMBER 10

Do you find that such joinder or consent by DORIS CARTER CORUM, if any, to the breach of fiduciary duty, if any, by CLYDE T. CARTER was a proximate cause of monetary loss, if any, to the Estate?

Answer "Yes" or "No"

We, the Jury, answer: NO

If you have answered Question Number 10 "Yes", then answer Question Number 11; otherwise, do not answer Question Number 11.

QUESTION NUMBER 11

Find the monetary loss, if any, to the Estate resulting from the joinder or consent by DORIS CARTER CORUM to the breach of fiduciary duty, if any, by CLYDE T. CARTER as Co-Executor.

You are instructed in connection with this question not to include any amounts for monetary losses, if any, to the Estate resulting from acts or conduct of CLYDE T. CARTER occurring before DORIS CARTER CORUM became a Co-Executor.

Answer in dollars and cents, if any:

We, the Jury, answer: _____

If you have answered Question Number 1 "Yes", then answer Question Number 12; otherwise, do not answer Question Number 12.

QUESTION NUMBER 12

Do you find that CLYDE T. CARTER committed the breach of fiduciary duty, if any, in bad faith?

In connection with this Question Number 12, you are instructed that *"bad faith"* means dishonesty or unfairness. The term means any act, omission, or concealment which involves the breach of legal duty, trust or confidence by which an undue advantage is taken of another.

Answer "Yes" or "No"

We, the Jury, answer: YES

If you have answered Question Number 6 or Question Number 9 "Yes", then answer Question Numbers 13, 14, & 15; otherwise, do not answer Question Numbers 13, 14 & 15.

In connection with the following Questions Numbered 13, 14, & 15, you are instructed that the following factors are to be considered in determining whether one

Co-Fiduciary, whether acting as an Executor or Trustee, is "substantially more at fault" than another:

(1) whether he fraudulently induced the other to join in the breach of fiduciary duty, if any;

(2) whether he intentionally committed a breach of fiduciary duty, if any, and the other was, at most, guilty of negligence;

(3) whether because of his greater experience he controlled the conduct of the other; or

(4) whether he alone committed the breach of fiduciary duty, if any, and the other is responsible only because of an improper delegation or failure to exercise reasonable care to prevent him from committing a breach of fiduciary duty, if any.

If you have found that JOE CARTER knowingly joined in or consented to a breach of fiduciary duty, if any, of CLYDE T. CARTER in response to Question Number 6, then answer Question Number 13, otherwise do not answer Question Number 13.

QUESTION NUMBER 13

Do you find that CLYDE T. CARTER was substantially more at fault, if at all, than JOE CARTER?

Answer "Yes" or "No"

We, the Jury, answer: _____

If you have found that DORIS CARTER CORUM knowingly joined in or consented to a breach of fiduciary duty, if any, of CLYDE T. CARTER in response to Question No. 6 or Question No. 9, then answer Question

Number 14, otherwise do not answer Question Number 14.

QUESTION NUMBER 14

Do you find that CLYDE T. CARTER was substantially more at fault, if at all, that DORIS CARTER CORUM?

Answer "Yes" or "No"

We, the Jury, answer: _____

If you have found that BLANCHE CARTER MARTIN knowingly joined in or consented to a breach of fiduciary duty, if any, of CLYDE T. CARTER in response to Question Number 6, then answer Question Number 15, otherwise do not answer Question Number 15.

QUESTION NUMBER 15

Do you find that CLYDE T. CARTER was substantially more at fault, if at all, than BLANCHE CARTER MARTIN?

Answer "Yes" or "No"

We, the Jury, answer: _____

QUESTION NUMBER 16

Do you find that any of the Trustees received benefits from the breach of fiduciary duty, if any you have found, and that such receipt of benefits proximately caused a monetary loss, if any, to the Trust?

Answer by writing "Yes" or "No" beside each name. For only those names beside which you have written "Yes" find the amount of such monetary loss, if any, to the Trust.

We, the Jury, answer:

	Benefits "Yes" or "No"	Monetary Loss to Trust Dollars and Cents, if any
Clyde T. Carter	YES	$7,000,000.00
Doris Carter Corum	YES	$74,912.00
Blanche Carter Martin	NO	
Joe Carter	YES	3,965.00

QUESTION NUMBER ~~18~~ 17

On what date did the beneficiaries of the Trust discover or in the exercise of reasonable diligence, should have discovered the facts giving rise to their claims against CLYDE T. CARTER?

You are instructed that as a trustee, CLYDE T. CARTER was in a fiduciary relationship with the beneficiaries and Co-Trustees of the Trust.

Answer with a date for each name below.

We, the Jury, answer:

Blanche Carter Martin	SEPTEMBER 1988
Mollie Martin Cannon	SEPTEMBER 1988
John Carter Martin	SEPTEMBER 1988
Doris Carter Corum	OCTOBER 1986
Neil Corum	OCTOBER 1986
Michael Corum	OCTOBER 1986
Joe Carter	OCTOBER 1986
Grace Carter	OCTOBER 1986

Joette Carter	FEBRUARY 1991
Crystal Jones	FEBRUARY 1991
Ed Rigsby	FEBRUARY 1991
David Carter	FEBRUARY 1991
Anita Carter	FEBRUARY 1991

QUESTION NUMBER ~~19~~ 18

Do you find that any of the following have received, either directly or indirectly, more than his or her share of Trust distributions and payments?

Answer by writing "Yes" or "No" beside each name. For those names beside which you have written "Yes", find the monetary loss, if any, to the Trust in dollars and cents proximately resulting from any excess distributions.

We, the jury, answer:

	"Yes" or "No"	Dollars and Cents
Clyde T. Carter	NO	
David Carter	YES	$1,900.00
Anita Carter	NO	
Blanche Carter Martin	NO	
Mollie Martin Cannon	NO	
John Carter Martin	NO	
Joette Lee Carter	NO	
Edward M. Rigsby	NO	
Crystal Jones	NO	
Grace Carter	NO	
Joe Carter	NO	
Michael Lee Corum	NO	
Neil Corum	NO	
Doris Carter Corum	NO	

QUESTION NUMBER ~~20~~ 19

What sum of money would be reasonable compensation to pay CLYDE T. CARTER for services rendered by him as one of the Trustees of the HARRY LEE CARTER ESTATE MANAGEMENT TRUST from July 13, 1977 until this date?

Answer in dollars and cents, if any.

We, the jury, answer: $500,000.00

QUESTION NUMBER ~~21~~ 20

Do you find that any of the following people are estopped from asserting a claim against CLYDE T. CARTER?

Answer "Yes" or "No" beside each name.

We, the Jury, answer:

Blanche Carter Martin	NO
Mollie Martin Cannon	NO
John Carter Martin	NO
Doris Carter Corum	NO
Neil Corum	NO
Michael Corum	NO
Joe Carter	NO
Grace Carter	NO
Joette Carter	NO
Crystal Jones	NO
Ed Rigsby	NO
David Carter	NO
Anita Carter	NO

QUESTION NUMBER ~~22~~ 21

Do you find that any of the following people have waived their right to assert a claim against CLYDE T. CARTER?

Answer "Yes" or "No" beside each name.

We, the Jury, answer:

Blanche Carter Martin	NO
Mollie Martin Cannon	NO
John Carter Martin	NO
Doris Carter Corum	NO
Neil Corum	NO
Michael Corum	NO
Joe Carter	NO
Grace Carter	NO
Joette Carter	NO
Crystal Jones	NO
Ed Rigsby	NO
David Carter	NO
Anita Carter	NO

QUESTION NUMBER ~~23~~ 22

What sum of money, if any, do you find to be reasonable and necessary attorney's fees for the services rendered by the law offices of Garza, Moore & Lazor, P.C. as follows:

Answer in dollars and cents, if any, as to each:

(a) For the preparation and presentation of this cause in this Court?

We, the Jury, answer: $375,000.00

(b) For legal services if this case is appealed to the Court of Appeals?

We, the Jury, answer: $50,000.00

(c) For legal services for making or responding to an application for writ of error to the Supreme Court of Texas?

We, the Jury, answer: $25,000.00

(d) For legal services if the application for writ of error is granted by the Supreme Court of Texas?

We, the Jury, answer: $15,000.00

QUESTION NUMBER ~~24~~ 23

What sum of money, if any, do you find to be reasonable and necessary attorney's fees for the services rendered by the Law Offices of Smith, Barshop, Stoffer & Millsap, Inc. as follows:

Answer in dollars and cents, if any, as to each:

(a) For the preparation and presentation of this cause in this Court?

We, the Jury, answer: $480,000.00

(b) For legal services if this case is appealed to the Court of Appeals?

We, the Jury, answer: $50,000.00

(c) For legal services for making or responding to an application for writ of error to the Supreme Court of Texas?

We, the Jury, answer: $25,000.00

(d) For legal services if the application for writ of error is granted by the Supreme Court of Texas?

We, the Jury, answer: $15,000.00

After you retire to the jury room, you will select your own Presiding Juror. The first thing the Presiding Juror will do is to have this complete Charge read aloud and then you will deliberate upon your answers to the questions asked.

It is the duty of the Presiding Juror to:

1. preside during your deliberations;

2. see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this Charge;

3. write out and hand to the bailiff any communication concerning the case which you desire to have delivered to the Judge;

4. vote on the questions;

5. write your answers to the questions in the spaces provided; and

6. certify to your verdict in the space provided for the Presiding Juror's signature, or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the Jury Room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the Courthouse, at your home, or elsewhere, please inform the Judge of this fact.

When you have answered all of the questions which you are required to answer under the instructions of the

Judge, and your Presiding Juror has placed your answers in the spaces provided, and signed the verdict as Presiding Juror or obtained the signatures, you will advise the bailiff at the door of the Jury Room that you have reached a verdict, and then you will return into Court with your verdict.

/s/ Keith Burris
JUDGE KEITH BURRIS

CERTIFICATE

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into Court as our Verdict.

(To be signed by the Presiding Juror if unanimous.)

_____
PRESIDING JUROR

(To be signed by those rendering the verdict, if *not* unanimous.)

/s/ Richard J. Illegible
/s/ Manuela Romero
/s/ Melissa Galindo
/s/ Irma S. Longoria
/s/ Ofilia T. Bernard
/s/ Marsha Duby
/s/ Deborah Fleming
/s/ Illegible
/s/ Estella Martinez
/s/ Ophelia M. Guerra

CONSTITUTION OF THE UNITED STATES
AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer

of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Rule 18. When Judge Dies During Term, Resigns or is Disabled

If the judge dies, resigns, or becomes unable to hold court during the session of court duly convened for the term, and the time provided by law for the holding of said court has not expired, such death, resignation, or inability on the part of the judge shall not operate to adjourn said court for the term, but such court shall be deemed to continue in session. If a successor to such judge shall qualify and assume office during the term, or if a judge be transferred to said district from some other judicial district, he may continue to hold said court for the term provided, and all motions undisposed of shall be heard and determined by him, and statements of facts and bills of exception shall be approved by him. If the time for holding such court expires before a successor shall qualify, and before a judge can be transferred to said district from some other judicial district, then all motions pending, including those for new trial, shall stand as continued in force until such successor has qualified and assumed office, or a judge has been transferred to said district who can hold said court, and thereupon such judge shall have power to act thereon at the succeeding term, or on an earlier day in vacation, on notice to all parties to the motion, and such orders shall have the same effect as if rendered in term time. The time for allowing statement of facts and bills of exception from such orders shall date from the time the motion was decided.

No. 94-359

Supreme Court, U.S.
FILED
SEP 29 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

CLYDE T. CARTER,

Petitioner,

v.

HARRY LEE CARTER ESTATE MANAGEMENT TRUST, ET AL.,

Respondents.

On Petition for Writ of Certiorari
To The Supreme Court Of The State of Texas

RESPONSE TO WRIT OF CERTIORARI BY DORIS CARTER CORUM, Individually and as Co-Independent Executrix of the Estate of Harry Lee Carter, Deceased and Co-Trustee of the Harry Lee Carter Estate Management Trust; NEIL CORUM; MICHAEL CORUM; JOE CARTER, Individually and as Co-Trustee of the Harry Lee Carter Estate Management Trust; GRACE CARTER; JOETTE CARTER; CRYSTAL JONES; EDWARD M. RIGSBY; BLANCHE CARTER MARTIN; MOLLIE MARTIN CANNON; AND JOHN CARTER MARTIN

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QUESTIONS PRESENTED (RESTATED)

1.

Was Clyde T. Carter denied due process of law when a successor trial judge – who, although not present during the jury trial – reviewed the entire transcribed record of the trial and heard extensive argument of counsel before entering judgment against him?

2.

Is the due process requirement of meaningful and adequate judicial review of punitive damage awards satisfied when a successor trial judge reviews the entire transcribed record of a trial and listens to extensive argument of counsel prior to entering judgment based on the jury verdict?

LIST OF PARTIES

The following individual needs to be added to the List of Parties submitted by Petitioner:

Bob Rodgers, Bankruptcy Trustee, In the Matter of Clyde Thomas Carter, Debtor(s).

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No. 94-359

In The

Supreme Court of the United States

October Term, 1994

CLYDE T. CARTE

Petitioner,

v.

HARRY LEE CARTER ESTATE MANAGEMENT TRUST, ET AL.,

Respondents.

On Petition for Writ of Certiorari To The Supreme Court Of The State of Texas

RESPONSE TO WRIT OF CERTIORARI BY DORIS CARTER CORUM, Individually and as Co-Independent Executrix of the Estate of Harry Lee Carter, Deceased and Co-Trustee of the Harry Lee Carter Estate Management Trust; NEIL CORUM; MICHAEL CORUM; JOE CARTER, Individually and as Co-Trustee of the Harry Lee Carter Estate Management Trust; GRACE CARTER; JOETTE CARTER; CRYSTAL JONES; EDWARD M. RIGSBY; BLANCHE CARTER MARTIN; MOLLIE MARTIN CANNON; AND JOHN CARTER MARTIN

OPINIONS BELOW

The lower courts' opinions and rulings are unreported. Copies of relevant decisions have been included as appendices to Petitioner's Petition.

STATEMENT OF THE CASE

Petitioner's "statement of the case" is inaccurate and misleading in the following particulars:

(1) The original trial judge (Judge Burris) was not "the only judge familiar with the complex factual details of (this) case." The entry of judgment in this case was delayed for six months when Clyde Carter filed bankruptcy. During this time, the court reporter completed the entire record[1] from the two week jury trial. This record was printed *and* available to the successor judge (Judge Lee) *prior to and during* all post-trial hearings. At the post-trial hearings, in addition to presenting legal arguments, counsel for each side specifically directed Judge Lee's attention to designated portions of the trial proceedings for review and consideration. Judge Lee stated he would rely on the statement of facts. All of the evidence, facts and details of the trial were available, in black and white, and *via* lengthy argument of counsel, to the judge who entered the judgment.

(2) The constitutionality of the exemplary damage award in this cause was *never reviewed* by the State Appellate Courts. Clyde Carter waived his right to complain about the *form* in which the exemplary damage question was submitted to the jury by failing to timely object to the submission at the trial. Subsequently, Clyde Carter *also* waived his "due process" complaints about the entry of the exemplary damages *by the successor trial judge* when he failed to brief the issue in his Application for Writ of

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[1] In Texas practice the transcription of the trial testimony and evidence is referred to as the **"statement of facts."**

Error filed with the Texas Supreme Court. As a result, the State Appellate Court and the Texas Supreme Court did not, and could not, consider the constitutional complaints presented in this Petition for Writ of Certiorari.

(3) Clyde Carter's bankruptcy was converted to a Chapter 7 case on July 12, 1994.[2] Thus, at the time this Petition for Certiorari was filed, this action belonged to Clyde Carter's Bankruptcy Trustee. The Bankruptcy Trustee elected *not* to pursue a further appeal.

ARGUMENT

This Court should deny the Petition for Writ of Certiorari in this case for the following reasons:

(1) The procedures followed by the successor trial judge in reviewing the transcribed record of the trial proceedings and in listening to extensive argument of counsel *prior* to entering judgment based on the jury's verdict satisfied "due process" requirements.

(2) There is no need or justification to "expand" the *Haslip* and *Oberg* opinions in this case because:

(a) The Petitioner waived his right to State Court review of his constitutional objections to the punitive damages in this case; and,

(b) Any *Haslip* infirmities which may have existed in Texas punitive damage procedures have already been addressed and corrected by the Texas Supreme

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[2] Respondents' App. 1.

Court in another case, *i.e., Transportation Insurance Company v. Moriel*, 37 Tex. Sup. Ct. J. 883 (June 8, 1994).

I.

Clyde Carter was not denied due process of law by the successor judge's entry of judgment in this cause.

Clyde Carter would like to convince this Court that the successor trial judge entered the judgment against him in a vacuum, with "no basis for assessing the sufficiency of the evidence, and . . . no background for evaluating the sheer excessiveness of the enormous exemplary damage award." The record in this cause proves otherwise.

The jury assessed $1.1 million as exemplary damages in this cause. Compared to the *actual* damages found by the jury of $7 million, this award can hardly be characterized as "enormous" or "excessive."[3]

Before entering judgment based on this verdict, the successor trial judge *was* provided with all information necessary to perform his "review" function. Clyde Carter filed Chapter 11 bankruptcy almost immediately after the verdict was returned and before the original trial judge could enter judgment. While proceedings to lift the bankruptcy stay were pending, the court reporter completed the "statement of facts" from the two week jury trial on July 22, 1992. This was four days prior to the death of the original trial judge (Judge Burris) and almost *two months before* the successor trial judge (Judge Lee) entered the

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[3] Respondent's App. 7.

judgment. The statement of facts (or record) was made available to Judge Lee for review *before* Judgment was entered. All parties were also given an opportunity to present arguments and to direct the Court's attention to specific testimony and evidence *before* the judgment was entered. At the hearing on the Motion to Enter Judgment, Judge Lee stated:

> I will rely on the statement of facts and I will listen to either side who wants to characterize the facts, but I will rely on the statement.[4]

After the entry of the judgment, Judge Lee's attention was again repeatedly directed to specific portions of the statement of facts in connection with his rulings on Clyde Carter's *post*-judgment motions.

Due process does not require a "perfect" trial. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrisey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). Apparently, Mr. Carter's position is that the post-verdict death of the trial judge ***automatically*** requires a re-trial, *regardless* of the availability of other procedural protections. Due process does not compel this conclusion.

Of necessity, the death of the original trial judge in this cause required some flexibility and additional effort on the part of the successor judge and the parties to ensure a meaningful trial court review of Mr. Carter's complaints. The procedure followed here, *i.e.*, review of the complete trial statement of facts (the record) and

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[4] Respondents' App. 44.

numerous opportunities for Mr. Carter's counsel to present argument in post-trial motions prior to and after the entry of judgment, certainly satisfied the trial court review requirement.

Significantly, Clyde Carter has not specified any evidence that must be "heard" rather than read to be fully "appreciated" or understood. Mr. Carter has also failed to articulate how the particular procedure followed in this case, *substantively diminished* the trial court review process. In the normal situation (without a record or "statement of facts") the trial judge must rely on his memory of the trial evidence. In the instant case, therefore, even if Judge Burris had lived, that "memory" would have been six (6) months old before Clyde Carter's Bankruptcy stay was lifted to allow entry of judgment. It is perhaps more logical to assume that the process followed here (review of the record) was superior to the norm, than to assume the converse, as Petitioner would argue.

Further, under Texas law, even if a trial judge personally disagrees with the jury's findings, he may not disregard or set aside the verdict if there is factually and legally sufficient evidence to support it *unless* the verdict is such "as to shock the conscience, to clearly indicate bias, and such, to be clearly unjust." *Crawford v. Standard Fire Ins. Co.*, 779 S.W.2d 935 (Tex. App. – Beaumont, 1989 no writ); *Caterpillar Tractor Co. v. Boyett*, 647 S.W.2d 782, 788 (Tex. App. – Corpus Christi 1984, no writ). To do otherwise would clearly infringe upon an equally important constitutional right; the right to trial by jury. This case involved egregious acts of fiduciary misappropriation and self-dealing by a trustee who was *also* a brother or uncle to the various trust beneficiaries. While the

verdict does reflect the jury's strong rejection of Clyde Carter's defenses, it does not fall within the "shocking" "biased" or "clearly unjust" categories.

Finally, unlike the Oregon procedure considered by this Court in *Honda Motor Co., Ltd. v. Karl L. Oberg*, ___ U.S. ___, 114. S. Ct. 2331 (1994), the Texas trial judge *can* order a remittitur of the exemplary damages assessed by jury if he believes the amount is clearly "excessive." *City Nat. Bank in Wichita Falls v. Jacksboro Nat. Bank*, 602 S.W.2d 511 (Tex. 1980). Clyde Carter did *not* seek a remittitur of the exemplary damages in this case in any of his post-verdict motions in the trial court, *nor* did he raise the remittitur issue in any of his appeals of the judgment to the State appellate courts. Only now, in his last desperate attempt[5] to prevent the enforcement of this judgment against him does he claim that "due process" requires that he be given a second chance, and another two week jury trial, to correct this oversight.

Texas Rule of Civil Procedure 18 was specifically designed to avoid unnecessary retrials and provides for the orderly disposition of cases after the death of a trial judge:

> If the judge dies, . . . during the session of court duly convened for the term, . . . such death, . . . shall not operate to adjourn said court for the term, but such court shall be deemed to continue in session. If a successor to such judge shall qualify and assume office during the

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[5] Mr. Carter testified at his Bankruptcy conversion hearing that "God" was the reason he had decided to file this Petition for Writ of Certiorari. (Respondents' App. 28).

> term, . . . he may continue to hold said court for the term provided, and all motions undisposed of shall be heard and determined by him, and statements of facts and bills of exception shall be approved by him. . . . [6]

Rule 18 has been consistently construed by Texas Courts to allow a successor judge to enter a judgment ***based on a jury verdict*** after the death or illness of the original judge who heard all or most of the testimony. *See, NeHoc Land Company v. City of Houston,* 342 S.W.2d 42 (Tex. Civ. App. – Houston 1960, writ ref'd n.r.e.;) and *Texaco, Inc. v. Pennzoil, Co.,* 729 S.W.2d 769, 845-847 (Tex. App. – Houston [1st Dist.] 1987) *cert. dism'd* 485 U.S. 994 (1988). *See also, Weiser v. Hampton,* 445 S.W.2d 224, 229 (Tex. Civ. App. – Houston [1st Dist.] 1961, writ ref'd n.r.e.) and *Bickham v. Herrin Transportation Co.,* 344 S.W.2d 953 (Tex. Civ. App. – Houston 1961, no writ).

Cases arising in the context of *non-jury trials,* or, where there was no statement of facts available prior to judgment, are simply not factually applicable to this action. In the instant case, *the complete statement of facts from the trial was available to Judge Lee* to determine whether there was evidence to support the jury findings as to breach of fiduciary duty, proximate cause, bad faith, actual and punitive damages, and attorneys fees. This transcription of evidence, *as well as the jury's findings,* provided all specific reference sources necessary for the entry of the "discretionary" portions of the judgment relating to the award of attorneys' fees, the forfeiture of Clyde Carter's $1 million fee for breach of fiduciary duty,

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[6] Petitioner's App. 66.

and the assessment of the auditor's fees as costs. *See, Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 769, 846 (Tex. App. – Houston [1st Dist.] 1987) *cert. dism'd* 485 U.S. 994 (1988) (successor judge had authority to make discretionary rulings on items he had not personally heard by referring to the Statement of Facts.)

Clyde Carter was given a full, fair trial and every opportunity to present his version of the case. The jury correctly found against him. The successor trial judge reviewed the trial statement of facts and relied upon his own objective assessment of this transcript, as well as extensive argument of counsel, to enter the judgment. The State Court of Appeals *again* reviewed the evidence and affirmed the judgment. The Texas Supreme Court declined to further review the case. Under the unfortunate circumstance created by the death of Judge Burris, the procedures followed in this case by the state courts were clearly adequate to provide Clyde Carter with full due process of law. *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 769, 847 (Tex. App. – Houston [1st Dist.] 1987) *cert. dism'd* 485 U.S. 994 (1988); *cf. Bickham v. Herrin Transportation*, 344 S.W.2d 953 (Tex. Civ. App. – Houston 1961, no writ).

II.

The Constitutional Exemplary Damage Complaints were Waived.

Under Texas law, all objections to the jury charge must be brought to the attention of the trial judge *prior* to the submission of the case to the jury, or the complaint is

waived. TEX. R. CIV. P. 272, 274; TEX. R. APP. P. 52(a).[7] Clyde Carter failed to make any constitutional objection to the form of exemplary damage question submitted in this case *prior* to submission of the charge to the jury and thereby waived his right to complain that the question, as submitted, was constitutionally invalid.[8] *Id.*, *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S.Ct. 2909 (1989); *Washburn v. Krenek*, 684 S.W.2d 187, 190 (Tex. App. – Houston [14th Dist.] 1984, writ ref'd n.r.e.).

Clyde Carter's attack on the successor judge's *post-verdict review* was also ultimately waived when he failed to separately brief the point in his Application for Writ of Error to the Texas Supreme Court. *Burgess v. Sylvester*, 182 S.W.2d 358, 360 (Tex. 1944); *accord La Sara Grain v. Frost Nat. Bank of Mercedes*, 673 S.W.2d 558, 568 (Tex. 1984).

This Court need not "review" questions which were not presented to the Texas Appellate Courts for consideration. Sup. Ct. R. 10.1(c). Moreover, Carter's attack on the exemplary damage award due to the death of the original trial judge again ignores the fact that, in this case, the successor trial judge had the complete Statement of Facts available to him; the parties specifically requested him to review and consider the Statement of Facts to satisfy any *Haslip* concerns; and the judge proceeded to do so. The review by the trial judge, coupled with the subsequent review by the state appeals court in this cause passes constitutional muster.

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[7] Respondents' App. 46 and 48.

[8] Petitioner's App. 27.

III.

There is no need to address the Texas procedure for imposition and review of exemplary damages.

The Texas Supreme Court recently clarified the procedural trial court and appellate review requirements for punitive damages awards in light of this Court's opinion in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). In the case of *Transportation Insurance Company v. Moriel*, 37 Tex. Sup. Ct. J. 883 (June 8, 1994) (in which the constitutional issue *was* properly preserved) the Texas Supreme Court set forth specific guidelines and standards for both trial court and appellate court review of punitive damage awards. *Id.*, 899-901. Thus, there is no need for this Court to utilize the instant case to "fix" a system which, if broken, has already been repaired. The "current Texas Practice" referred to by Petitioner at page 9 of his petition is no longer "current" or "the practice" in Texas. Having waived his constitutional arguments at the state court level, Mr. Carter's resort to this court to correct his oversight on the theory that the Texas system needs further refinement is unjustifiable.

CONCLUSION

For the reasons stated above, Clyde T. Carter's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

In the Matter of:	}	
	}	
CLYDE THOMAS CARTER,	}	CASE NO. 91-80587
	}	CHAPTER 13
Debtor(s)	}	
	}	

ORDER

(Filed Jul. 12, 1994)

This matter is before the Court on a motion filed by Harry Lee Carter Estate Management Trust, Doris Carter Corum, Joe Carter, Neil Corum, Michael Lee Corum, Grace Carter, Joette Lee Carter, Crystal Jones, Edward m. [sic] Rigsby, Blanche Carter Martin, Mollie Martin Cannon and John Carter Martin to convert the above case to a Chapter 7 and on a motion filed by Robert E. Long, Jr., Staff Attorney for the Bankruptcy Administrator, to dismiss or convert, to compel debtor to file a plan, or in the alternative, to appoint a Chapter 11 trustee. The hearing on these matters was held on the 11th day of June, 1994.

The debtor is a beneficiary of the trust known as the Harry Lee Carter Estate Management Trust and served as trustee of said trustee [sic] for several years. In 1990, an $8,000,000.00 judgment was entered against the debtor in the state court of Texas. The judgment was based upon fraudulent acts committed by the debtor while acting as trustee of the trust and breach of the fiduciary duty to the

other three beneficiaries. The debtor appealed this judgment to the Texas Court of Appeals, which affirmed the judgment on October 13, 1993. The Supreme Court of Texas denied the Application for Writ of Error on April 20, 1994, and rehearing on June 8, 1994. The Harry Lee Carter Estate Management Trust, Doris Carter Corum et al, have an unsecured claim in the approximate amount of $8,000,000.00 against the debtor and his bankruptcy estate. It should be noted that the debtor testified that he intends to appeal the judgment to the United States Supreme Court.

Prior to the state court of Texas entering a final judgment, the debtor filed for relief under Chapter 11 on March 23, 1991, and filed his Plan of Reorganization on March 23, 1992. On September 23, 1992, the debtor filed his amended Plan of Reorganization. Pursuant to the Order entered by this Court on November 17, 1992, which in effect allowed this bankruptcy proceeding to lay dormant while the issues in the state court of Texas were being appealed. No confirmation hearings were conducted by this Court.

On December 10, 1992, the debtor's former wife, Frances Corrine Carter, filed a motion for relief from the stay to obtain a divorce from the debtor in the state court of Alabama. The Court granted the relief on February 10, 1993, and a divorce decree by default was entered against the debtor by the state court of Alabama on August 11, 1993. Pursuant to the divorce decree, Mrs. Carter received real estate valued at approximately $450,000.00, and the debtor was awarded property valued at approximately $160,000.00. It should be noted that title to the real estate has not been conveyed to Mrs. Carter.

On April 4, 1994, the debtor filed a motion to sell his home in Lookout Mountain, Georgia to his son for the sum of $250,000.00. Subsequently, the debtor withdrew his motion. At the same time, the debtor was trying to sell his home for the sum of $1,250,000.00. He testified that he had no offers.

Mr. Lemar Thomas, a real estate appraiser from Chattanooga, Tennessee, testified that the value of the debtor's home was approximately $600,000.00. He testified that the records indicate that the debtor purchased the home in 1981 for the sum of $296,000.00.

The evidence shows that since the debtor filed bankruptcy in 1991, he has had no active income except $400.00 from the sale of a motorcycle and $400.00 from the sale of insurance. The debtor's other source of revenue has been interest from his investments or proceeds received from the sale of government bonds. The evidence also shows that the debtor is 67 years old and has been injured in an accident that may require additional surgery in the future. The evidence shows that during the three and one-half years that the debtor's case has been pending, he has spend [sic] approximately $386,000.00. Approximately $36,000.00 of the $386,000.00 was spent on preservation of the estate property (taxes, insurance. During that same period of time, income to the estate, other than the $800.00 referred to above, was in the approximate amount of $86,000.00. This income was derived from interest paid on assets of the estate.

Section 1112(b) of the Code states that a Chapter 11 petition may be dismissed or converted to a Chapter 7 proceeding for (1) continuing loss or diminution of the

estate or absence or a reasonable likelihood of rehabilitation and (2) inability to effectuate a plan.

> In order for the Court to dismiss or convert under subsection one, the debtor's financial condition must be such as to permit the court to determine that there is no reasonable likelihood that the debtor will be rehabilitated. "Rehabilitate" has been defined to mean "to put back in good condition; to re-establish on a firm, sound basis." Rehabilitate, as used in 1112(b)(1), does not mean the same thing as reorganization. The court must determine whether causes of the debtor's continuing losses can be corrected.
>
> If the debtor is unable to propose a plan that meets the requirements of Section 1129(a), then the debtor lacks the ability to effectuate a plan. The Chapter 11 proceeding should be dismissed or converted. *Collier on Bankruptcy* @ 1112.03[iii] at 1112-21 to 1112-23.

The decision to convert or dismiss a Chapter 11 proceeding is within the sound discretion of the judge. *Id.*

After consideration of the evidence and conclusions of law, the Court finds that the debtor's estate has continued to lose value, and this is due to the actions of the debtor. This finding is supported by the fact that the debtor allowed the default judgment in the domestic relations case to be entered, whereby property of the estate was given to his former wife. The debtor also consented to the sale of his home at Lookout Mountain, Georgia, for $250,000.00, when its true value was at least $600,000.00. In fact, the debtor attempted to sell the property for $1,250,000.00. This was not a proper protection of the assets of the estate by the debtor in possession. The

Court finds that the proposed sale of his home at Lookout Mountain in Georgia was not in good faith. The debtor has also allowed timber to be sold from real estate that is property of the estate, and the money derived from the sale of that timber has not been accounted for to this estate and has not appeared on the operating reports submitted to the Bankruptcy Court Administrator.

The Court further finds that the debtor lacks the ability and funds to effectuate a plan of reorganization. The finding is support [sic] by the fact that the debtor has had no income of his own since 1991, except for the $400.00 from the sale of a motorcycle, which was not authorized by the Court, and $400.00 recently from the sale of his prepaid insurance. The debtor has been injured in an accident and suffers from injuries that physically incapacitate him. This may hinder his ability to earn income either now or in the future. The only income to this estate is the interest earned from the assets of said estate and said interest is not sufficient to pay the expenses/creditors of the estate.

The Court further finds that the judgment for $8,000,000.00 has finally been adjudicated in so far as this Court can recognize in the State of Texas. The case has gone to the Supreme Court of Texas and rehearing was denied. There is no question that there is an $8,000,000.00 claim against this estate and that only by the remotest possibility could the judgment be overruled by certiorari to the Supreme Court of the United States. Therefore, with the $8,000,000.00 claim against the estate and the Court having before it what the assets of the estate are

worth, it appears that there is no possible plan of reorganization that can be proposed by this debtor in possession that would comply with Section 1129(a) or Section 1129(b). There is no possibility of a plan being proposed that would service the $8,000,000.00 debt that has been finally adjudicated in the State of Texas. The debtor's Chapter 11 petition is due to be converted to a Chapter 7 proceeding.

The Court further finds that because of the improprieties that have occurred that the debtor should not remain in possession and be allowed to liquidate the estate himself. The Court believes that it is in the debtor's best interest and in the creditor's best interest that this case be converted to one under Chapter 7 and that a trustee be appointed.

It is therefore ORDERED, ADJUDGED and DECREED that debtor's Chapter 11 case be converted to a Chapter 7, and that a trustee be appointed immediately.

Done and Ordered this the 12th day of July, 1994.

/s/ Jack Caddell
Jack Caddell
Bankruptcy Judge

/csc

c: Debtor(s)
William Chenault, III, Attorney for Debtor(s)
Lee R. Benton, Esq.
Bankruptcy Administrator

EXHIBIT A

CAUSE NO. 146,155

THE ESTATE OF	§	PENDING IN THE
HARRY LEE CARTER	§	PROBATE COURT NO. 2
	§	BEXAR COUNTY, TEXAS
DECEASED	§	

CHARGE OF THE COURT

(Filed Febr. 15, 1991)

MEMBERS OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this Charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1.

Do not let bias, prejudice or sympathy play any part in your deliberations.

2.

In arriving at your answers, consider only the evidence introduced here under oath, under the rulings of the court – that is, what you have seen and heard in this

Courtroom – together with the law as given you by the Court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3.

Since every answer that is required by the Charge is important, no juror should state or consider that any required answer is not important.

4.

You must not decide who you think should win and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5.

You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6.

You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you

must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the Presiding Juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

7.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the Judge. If it should be found that you have disregarded any of the instructions, it will be jury misconduct and it may require another trial by another jury. If that happens, all of our time will have been wasted.

8.

The Presiding Juror or any other juror who observes a violation of the Court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

9.

When words are used in this Charge in a sense that varies from their commonly understood meaning, you are given a proper legal definition, which you must accept in place of any other meaning.

10.

Answer "Yes" or "No" unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No". Whenever a question requires other than a "Yes" or "No" answer, your answer must be based on a preponderance of the evidence.

"Preponderance of the Evidence" means the greater weight and degree of credible testimony or evidence introduced before you and admitted in this case.

"Trust" means the HARRY LEE CARTER ESTATE MANAGEMENT TRUST and includes all fourteen (14) individual trusts established by the following parties: Doris Carter Corum, Michael Lee Corum, Neil Corum, Clyde T. Carter, David Carter, Anita Carter, Joe Carter, Grace Carter, Joette Lee Carter, Edward M. Rigsby, Crystal Jones, Blanche Carter Martin, Mollie M. Cannon, and John Carter Martin.

"Executor" means a person acting as a personal representative of the estate of a deceased individual, and in this charge the term "Executor" means and includes those persons acting as a temporary or permanent administrator of the Estate as well as an Independent Executor of the Estate.

"Fiduciary duty" means the duty of a trustee to manage the trust property in accordance with the provisions

of the Trust Agreement, and in connection with such management, to exercise the highest degree of honesty and fair dealing; to act with the utmost good faith for the sole benefit of the Trust; to make full disclosure of all material facts to the beneficiaries of the Trust; and to exercise the same degree of care, prudence, and diligence as an ordinarily prudent and careful person would exercise in the management of his own affairs. A trustee also has a fiduciary duty to maintain adequate records to support all trust expenditures and to make a full accounting of all funds belonging to the trust. The trustee has the burden of producing evidence to establish that all money spent was for the benefit of the trust and, in the absence of such evidence any unsupported expenditures of funds from the trust should be reimbursed to the trust by the trustee. An executor owes the same fiduciary duties as a Trustee in connection with his management of an estate.

"Proximate Cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred; and in order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

"Exemplary Damages" means an amount which you may, in your discretion, award as an example to others and as a penalty or by way of punishment. Exemplary damages or punitive damages may be awarded in addition to any amount which may be or has been found by you as actual damages.

"Waiver" means the intentional surrender of a known right or intentional conduct inconsistent with claiming that right if made after receipt of full disclosure of all material information.

A person is *"estopped"* if, after full disclosure of all material facts, he acts or fails to act with the intention that another rely on such action or inaction, and if such other person does in good faith rely to his detriment on the acts or inactions of the first person.

"Negligence" means failure to use ordinary care; that is, failure to do that which a person of ordinary prudence would have done under the same or similar circumstances, or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.

QUESTION NUMBER 1

Do you find that CLYDE T. CARTER breached his fiduciary duty as Executor/Trustee?

Answer "Yes" or "No"

We, the Jury, answer: YES

If you have answered Question Number 1 "Yes", then answer Question Number 2; otherwise, do not answer Question Number 2.

QUESTION NUMBER 2

Do you find that such breach of fiduciary duty, if any, by CLYDE T. CARTER was a proximate cause of monetary loss, if any, to the Trust?

Answer "Yes" or "No"

We, the Jury, answer: YES

If you have answered Question Number 2 "Yes", then answer Question Number 3 ; otherwise, do not answer Question Number 3 .

QUESTION NUMBER 3

Find the amount of monetary loss, if any, to the Trust proximately resulting from the breach of fiduciary duty, if any, by CLYDE T. CARTER.

Answer in dollars and cents, if any:

We, the Jury, answer: $7,000,000.00

If you have answered Question Number 1 "Yes", then answer Question Number 4 ; otherwise, do not answer Question Number 4 .

QUESTION NUMBER 4

Do you find that CLYDE T. CARTER breached his fiduciary duty as Executor/Trustee willfully or with reckless disregard for the rights of the beneficiaries of the Trust?

Answer "Yes" or "No"

We, the Jury, answer: YES

If you have answered Question Number 4 "Yes", then answer Question Number 5 ; otherwise, do not answer Question Number 5 .

QUESTION NUMBER 5

What amount of money, if any, do you find should be assessed against CLYDE T. CARTER as exemplary damages for the benefit of the following people:

Answer in dollars and cents, if any, beside each name.

We, the Jury, answer:

$ 93,750.00	Blanche Carter Martin
$ 93,750.00	Mollie Martin Cannon
$ 93,750.00	John Carter Martin
$ 93,750.00	Joette Lee Carter
$ 59,375.00	Edward M. Rigsby
$ 93,750.00	Crystal Jones
$ 59,375.00	Grace Carter
$ 93,750.00	Joe Carter
$162,500.00	Michael Lee Corum
$ 93,750.00	Neil Corum
$162,500.00	Doris Carter Corum

If you have answered Question Number 1 "Yes", then answer Question Number 6; otherwise, do not answer Question Number 6.

QUESTION NUMBER 6

Do you find that any of the Co-Trustees knowingly joined in or consented to the breach of fiduciary duty, if any, by CLYDE T. CARTER as Executor/Trustee?

Answer by writing "Yes" or "No" beside each name.

We, the Jury, answer:

No Joe Carter
No Doris Carter Corum
No Blanche Carter Martin

If you have answered Question Number 6 "Yes" beside any name, then, as to those names only, answer Question Number 7 ; otherwise, do not answer Question Number 7 .

QUESTION NUMBER 7

Do you find that such joining in or consenting to the breach of fiduciary duty, if any, by CLYDE T. CARTER as a Trustee was a proximate cause of monetary loss, if any, to the Trust?

Answer by writing "Yes" or "No" beside each name.

We, the Jury, answer:

No Joe Carter
No Doris Carter Corum
No Blanche Carter Martin

If you have answered Question Number 7 "Yes" beside any name, then as to those names only, answer Question Number 8 ; otherwise, do not answer Question Number 8 .

QUESTION NUMBER 8

Find the monetary loss, if any, to the Trust, resulting from the joinder or consent to the breach of fiduciary

duty, if any, by CLYDE T. CARTER as a Trustee, by each of the following:

You are instructed in connection with this question not to include any amounts for monetary losses, if any, to the Trust resulting from acts or conduct of CLYDE T. CARTER occurring either before or after each of the named individuals was serving as a Co-Trustee of the Trust.

Answer in dollars and cents, if any, beside each name.

We, the Jury, answer:

_____ Joe Carter
_____ Doris Carter Corum
_____ Blanche Carter Martin

If you have answered Question number 7 "Yes" then answer Question Number 9 ; otherwise, do not answer Question Number 9 .

QUESTION NUMBER 9

Do you find that DORIS CARTER CORUM, as Co-Executor, knowingly joined in or consented to the breach of fiduciary duty, if any, by CLYDE T. CARTER as a Co-Executor?

Answer "Yes" or "No"

We, the Jury, answer: NO

If you have answered Question Number 9 "Yes", then answer Question Number 10 ; otherwise, do not answer Question Number 10 .

QUESTION NUMBER 10

Do you find that such joinder or consent by DORIS CARTER CORUM, if any, to the breach of fiduciary duty, if any, by CLYDE T. CARTER was a proximate cause of monetary loss, if any, to the Estate?

Answer "Yes" or "No"

We, the Jury, answer: NO

If you have answered Question Number 10 "Yes", then answer Question Number 11 ; otherwise, do not answer Question Number 11 .

QUESTION NUMBER 11

Find the monetary loss, if any, to the Estate resulting from the joinder or consent by DORIS CARTER CORUM to the breach of fiduciary duty, if any, by CLYDE T. CARTER as Co-Executor.

You are instructed in connection with this question not to include any amounts for monetary losses, if any, to the Estate resulting from acts or conduct of CLYDE T. CARTER occurring before DORIS CARTER CORUM became a Co-Executor.

Answer in dollars and cents, if any

We, the Jury, answer: _____

If you have answered Question Number 1 "Yes", then answer Question Number 12 ; otherwise, do not answer Question Number 12 .

QUESTION NUMBER 12

Do you find that CLYDE T. CARTER committed the breach of fiduciary duty, if any, in bad faith?

In connection with this Question Number 12, you are instructed that *"bad faith"* means dishonesty or unfairness. The term means any act, omission, or concealment which involves a breach of legal duty, trust or confidence by which undue advantage is taken of another.

Answer "Yes" or "No"

We, the Jury, answer: YES

If you have answered Question Number 6 or Question Number 9 "Yes", then answer Question Numbers 13, 14 & 15 ; otherwise, do not answer Question Numbers 13, 14 & 15 .

In connection with the following Questions Numbered 13, 14 & 15 , you are instructed that the following factors are to be considered in determining whether one Co-Fiduciary, whether acting as an Executor or Trustee, is "substantially more at fault" than another:

(1) whether he fraudulently induced the other to join in the breach of fiduciary duty, if any;

(2) whether he intentionally committed a breach of fiduciary duty, if any, and the other was, at most, guilty of negligence;

(3) whether because of his greater experience he controlled the conduct of the other; or

(4) Whether he alone committed the breach of fiduciary duty, if any, and the other is

responsible only because of an improper delegation or failure to exercise reasonable care to prevent him from committing a breach of fiduciary duty, if any.

If you have found that JOE CARTER knowingly joined in or consented to a breach of fiduciary duty, if any, of CLYDE T. CARTER in response to Question Number 6 , then answer Question Number 13 , otherwise do not answer Question Number 13 .

QUESTION NUMBER 13

Do you find that CLYDE T. CARTER was substantially more at fault, if at all, than JOE CARTER?

Answer "Yes" or "No"

We, the Jury, answer: _____

If you have found that DORIS CARTER CORUM knowingly joined in or consented to a breach of fiduciary duty, if any, of CLYDE T. CARTER in response to Question No. 6 , or Question No. 9 , then answer Question Number 14 , otherwise do not answer Question Number 14 .

QUESTION NUMBER 14

Do you find that CLYDE T. CARTER was substantially more at fault, if at all, than DORIS CARTER CORUM?

Answer "Yes" or "No"

We, the Jury, answer: _____

If you have found that Blanche Carter Martin knowingly joined in or consented to a breach of fiduciary duty, if any, of CLYDE T. CARTER in response to Question Number 6 , then answer Question Number 15 , otherwise do not answer Question Number 15 .

QUESTION NUMBER 15

Do you find that CLYDE T. CARTER was substantially more at fault, if at all, than BLANCHE CARTER MARTIN?

Answer "Yes" or "No"

We, the Jury, answer: _____

QUESTION NUMBER 16

Do you find that any of the Trustees received benefits from the breach of fiduciary duty, if any you have found, and that such receipt of benefits proximately caused a monetary loss, if any, to the Trust?

Answer by writing "Yes" or "No" beside each name. For only those names beside which you have written "Yes" find the amount of such monetary loss, if any, to the Trust.

We, the Jury, answer:

	Benefits "Yes" or "No"	Monetary Loss to Trust Dollars and Cents, if any
Clyde T. Carter	YES	$7,000,000.00
Doris Carter Corum	YES	$74,912.00
Blanche Carter Martin	NO	
Joe Carter	YES	$3,965.00

QUESTION NUMBER ~~18~~ 17

On what date did the beneficiaries of the Trust discover or in the exercise of reasonable diligence, should have discovered the facts giving rise to their claims against CLYDE T. CARTER?

You are instructed that as a trustee, CLYDE T. CARTER was in a fiduciary relationship with the beneficiaries and Co-Trustees of the Trust.

Answer with a date for each name below.

We, the Jury, answer:

Blanche Carter Martin	SEPTEMBER 1988
Mollie Martin Cannon	SEPTEMBER 1988
John Carter Martin	SEPTEMBER 1988
Doris Carter Corum	OCTOBER 1986
Neil Corum	OCTOBER 1986

Michael Corum	OCTOBER 1986
Joe Carter	OCTOBER 1986
Grace Carter	OCTOBER 1986
Joette Carter	FEBRUARY 1991
Crystal Jones	FEBRUARY 1991
Ed Rigsby	FEBRUARY 1991
David Carter	FEBRUARY 1991
Anita Carter	FEBRUARY 1991

QUESTION NUMBER ~~19~~ 18

Do you find that any of the following have received, either directly or indirectly, more than his or her share of Trust distributions and payments?

Answer by writing "Yes" or "No" beside each name. For those names beside which you have written "Yes", find the monetary loss, if any, to the trust in dollars and cents proximately resulting from any excess distributions.

We, the Jury, answer:

	"Yes" or "No"	Dollars and Cents
Clyde T. Carter	NO	
David Carter	YES	$1,900.00
Anita Carter	NO	
Blanche Carter Martin	NO	
Mollie Martin Cannon	NO	
John Carter Martin	NO	
Joette Lee Carter	NO	
Edward M. Rigsby	NO	
Crystal Jones	NO	
Grace Carter	NO	

Joe Carter	NO	
Michael Lee Corum	NO	
Neil Corum	NO	
Doris Carter Corum	NO	

QUESTION NUMBER ~~20~~ 19

What sum of money would be reasonable compensation to pay CLYDE T. CARTER for services rendered by him as one of the Trustees of the HARRY LEE CARTER ESTATE MANAGEMENT TRUST from July 13, 1977 until this date?

Answer in dollars and cents, if any.

We, the Jury, answer: $500,000.00

QUESTION NUMBER ~~21~~ 20

Do you find that any of the following people are estopped from asserting a claim against CLYDE T. CARTER?

Answer "Yes" or "No" beside each name

We, the Jury, answer:

Blanche Carter Martin	NO
Mollie Martin Cannon	NO
John Carter Martin	NO
Doris Carter Corum	NO
Neil Corum	NO
Michael Corum	NO
Joe Carter	NO
Grace Carter	NO
Joette Carter	NO
Crystal Jones	NO
Ed Rigsby	NO

David Carter	NO
Anita Carter	NO

QUESTION NMBER ~~22~~ 21

Do you find that any of the following people have waived their right to assert a claim against CLYDE T. CARTER?

Answer "Yes" or "No" beside each name.

We, the Jury, answer:

Blanche Carter Martin	NO
Mollie Martin Cannon	NO
John Carter Martin	NO
Doris Carter Corum	NO
Neil Corum	NO
Michael Corum	NO
Joe Carter	NO
Grace Carter	NO
Joette Carter	NO
Crystal Jones	NO
Ed Rigsby	NO
David Carter	NO
Anita Carter	NO

QUESTION NUMBER ~~23~~ 22

What sum of money, if any, do you find to be reasonable and necessary attorney's fees for the services rendered by the law offices of Garza, Moore & Lazor, P.C. as follows:

Answer in dollars and cents, if any, as to each:

(a) For the preparation and presentation of this cause in this Court?

We, the Jury, answer: $375,000.00

(b) For legal services if this case is appealed to the Court of Appeals?

We, the Jury, answer: $50,000.00

(c) For legal services for making or responding to an application for writ of error to the Supreme Court of Texas?

We, the Jury, answer: $25,000.00

(d) For legal services if the application for writ of error is granted by the Supreme Court of Texas?

We, the Jury, answer: $15,000.00

QUESTION NUMBER ~~24~~ 23

What sum of money, if any, do you find to be reasonable and necessary attorney's fees for the services rendered by the law offices of Smith, Barshop, Stoffer & Millsap, Inc. as follows:

Answer in dollars and cents, if any, as to each:

(a) For the preparation and presentation of this cause in this Court?

We, the Jury, answer: $480,000.00

(b) For legal services if this case is appealed to the Court of Appeals?

We, the Jury, answer: $50,000.00

(c) For legal services for making or responding to an application for writ of error to the Supreme Court of Texas?

We, the Jury, answer: $25,000.00

(d) For legal services if the application for writ of error is granted by the Supreme Court of Texas?

We, the Jury, answer: $15,000.00

After you retire to the jury room, you will select your own Presiding Juror. The first thing the Presiding Juror will do is to have this complete Charge read aloud and then you will deliberate upon your answers to the questions asked.

It is the duty of the Presiding Juror to:

1. preside during your deliberations;

2. see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this Charge;

3. write out and hand to the bailiff any communication concerning the case which you desire to have delivered to the Judge;

4. vote on the questions;

5. write your answers to the questions in the spaces provided; and

6. certify to your verdict in the space provided for the Presiding Juror's signature, or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the Jury Room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the Courthouse, at your home, or elsewhere, please inform the Judge of this fact.

When you have answered all of the questions which you are required to answer under the instructions of the Judge, and your Presiding Juror has placed your answers in the spaces provided, and signed the verdict as Presiding Juror or obtained the signatures, you will advise the bailiff at the door of the Jury Room that you have reached a verdict, and then you will return into Court with your verdict.

/s/ Keith Burris
JUDGE KEITH BURRIS

CERTIFICATE

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into Court as our Verdict.

(To be signed by the Presiding Juror if unanimous.)

PRESIDING JUROR

(To be signed by those rendering the verdict, if *not* unanimous.)

/s/ Richard J. Illegible
/s/ Manuela Romero
/s/ Melissa Galindo
/s/ Irma S. Longoria
/s/ Ofilia F. Bernard
/s/ Marsha Duby
/s/ Deborah Fleming
/s/ Illegible
/s/ Estella Martinez
/s/ Ophelia M. Guerra

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

In The Matter Of:	Case No. BK 91-80587
CLYDE THOMAS CARTER, Debtor.	Chapter 11 Huntsville, Alabama July 11, 1994 10:30 O'clock A.M.

PARTIAL TRANSCRIPT OF HEARING BEFORE THE HONORABLE JACK A. CADDELL (Testimony of Clyde Thomas Carter)

(Filed Aug. 17, 1994)

APPEARANCES:

For Debtor:
William Chenault, III, Esq.
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For Harry Lee Carter Estate Management Trust:
Lee R. Benton, Esq.
P.O. Box 1865
Birmingham, Alabama 35201-1865

For Bankruptcy Administrator's Office:
Robert Long, Esq.
P.O. Box 1289
Decatur, Alabama 35602

Audio Operator:
Jim Sherman

[p2] **PROCEEDINGS**

CLYDE THOMAS CARTER, MOVANT'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. BENTON:

Q Would you state your name, please?

A Clyde Carter.

Q Mr. Carter, are you the debtor in this case?

A Yes, sir

Q And did you file the original petition that was filed, I believe in 1991?

A Mr. Weems did.

Q All right, sir. And did you review it and sign it?

A I signed it, yes.

Q You were aware that you were signing under penalty of perjury when you signed it?

A No, sir.

Q You were not aware of that?

A No, sir.

Q There was not an indication immediately above your name to that effect?

A Could have been. I do not remember.

Q Did you try to use your best knowledge and information when you filed the plan?

A I picked the best lawyer I thought.

Q Yes. But he worked with information you supplied, didn't [p3] he?

A In writing, yes, sir.

Q All right, sir. Did he just come up with figures and information that you did not provide to him?

A A lot of it, yes, sir. He wrote off to all kinds of people that do research work to get all this information, yes, sir.

Q All right, sir. When you listed the twenty largest unsecured creditors and you filed and signed on that basis, did you review that? That's under Exhibit 1 that's filed here.

A You know, I could have reviewed it, but I don't recall what it said.

Q Okay. You are aware that when you filed your petition the jury had returned a verdict against you in a Texas probate proceeding? You were aware of that, weren't you?

A Yes, sir.

Q All right. And you are aware that this Court later lifted the stay so the judgment could be entered in that case?

A Yes, sir.

Q All right. And you've been prosecuting that appeal?

A Yes, sir.

Q What's the basis of your proposed writ of certiorari to the United States Supreme Court, do you know?

[p4] A Sure. God.

Q Okay. What else?

THE COURT: Excuse me.

THE WITNESS: God.

THE COURT: I didn't hear that first answer.

MR. BENTON: God.

THE WITNESS: God. I'm a Christian.

BY MR. BENTON:

Q Okay. Any other basis besides God?

A No, sir.

Q All right. Now, you are aware that the Texas Supreme Court denied your writ of certiorari?

A June the 8th, yes, sir.

Q Okay. And no supersedeas bond has been entered on that judgment, am I right?

A To my knowledge.

Q To your knowledge, no, it has not?

A Correct.

Q Do you have a job?

A I'm trying to sell prepaid legal insurance, yes, sir.

Q Okay. And have you earned any income on that?

A Some, yes, sir.

Q Have you reported any of that income to the bankruptcy administrator?

A Well, I was told by Mr. Weems that whatever I earned

* * *

NO. 146.155

THE ESTATE OF	*	IN PROBATE COURT
HARRY LEE CARTER.	*	NUMBER TWO
DECEASED	*	BEXAR COUNTY, TEXAS
	*	
	*	

Volume VI
MOTION TO ENTER JUDGMENT
MOTION FOR SEVERANCE

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[p.42] should be terminated or if they want to leave it in a trust, that's fine. Our clients want out and we should at least be entitled to be severed out.

One other additional point, with regard to all the other pending litigation, the Exxon cases and so forth, it's not necessary that a unity of a trust still be there. The attorney that's representing the interests of the beneficiaries in that litigation can certainly continue on under the same contractual relationship as far as attorneys' fees are concerned. It's not necessary that it be administered by a trustee on behalf of my clients.

THE COURT: All right. Anything further on that issue? Let's go ahead and take up the Motion to Enter Judgment.

MS. MOORE: May I proceed, Your Honor?

THE COURT: You may proceed.

MS. MOORE: Your Honor, at the Court's request, after the last hearing we endeavored to present a brief to the Court addressing the claims for relief in our [p. 43] Motion for Judgment and responding to the objections that were filed by Mr. Clyde Carter last Friday before last or the 5th of September. Some of the objections that Mr. Carter filed were not briefed by his side. However, we did include it in our brief, and I'll go through them point by point if that's all right.

Your Honor, in our brief, and understanding that this Court was not present during the jury trial, we endeavored – actually, it's the second section, Roman Numeral I. I apologize. I've got a typographical error on 2. My secretary was out ill last Thursday and Friday and we had a struggle, but beginning on page 2 of our brief where it says "Background." We attempted to give this Court some of the background in the case using some Statement of Fact references and some exhibit references so that the Court would know where to turn specifically in the Statement of Facts for any specific questions. We did not try to make this an exhaustive or complete recitation. I, quite frankly, have not read [p. 44] through the full Statement of Facts. We just got it in July, and given the circumstances, I haven't read it all. I did try to go through and give you at least some points so the Court could understand the factual position.

I think that that particular section, which is pages 2 through 8, points out that this case is certainly appropriate under Rule 18, appropriate under that rule for this

Court to enter the Judgment we have requested based on the jury verdict. The rule is designed for that, Your Honor, in my opinion, and we've got – we have cited for the Court the case of Netloc Land Company versus City of Houston and the obviously infamous Texaco versus Pennzoil case.

Your Honor, you are in a rather enviable position, quite frankly, if that can be stated, under Rule 18, of not only having a jury verdict, but you have a complete Statement of Facts. That is very rare, and that only happened in this case due to Mr. Carter's request for it. It's a happy coincidence for our side because now we can [p. 45] affirmatively state if you have any question, Your Honor, regarding your exercise of discretion, you may read the Statement of Facts. That was precisely the issue that became significant in the Texaco versus Pennzoil case when Judge Casseb, who filled in, made certain post-trial rulings. The losing party complains saying, "You haven't heard all the evidence."

The Court in that instance was fortunate to have daily transcripts, daily Statements of Fact, and the Appellate Court said not only did this Judge have a jury verdict, but he had daily transcripts. If he had any questions, he could read it. It's as good as hearing it.

Their objections to having a judge enter a judgment who had not presided over the entire trial was rejected. That was upheld by the Court of Appeals in Houston and also by the United States Supreme Court under process grounds.

Mr. Carter's attorneys have raised the point, they say Pennzoil is distinguishable because that Judge heard

some of the evidence [p. 46] and ours is different because you heard none of it. Quite frankly, Your Honor, I don't think it's a question of all or none. I think it is a question of realities and what happens in situations, not what this Court did not hear in this case, but what is available to this Court in lieu of having to sit through the two-week trial. You have every word that Judge Burris heard, every word that was admitted and some that were not. I'm assuming some discourse with the Court off the record. There is nothing that was introduced at trial that is not available to you.

We feel under Rule 18 that you certainly have the authority to enter the Judgment based on the jury's verdict on the damages we've requested, and we think you have the authority to enter the discretionary portions of the Judgment, those portions being our request for attorneys' fees. We've asked for the attorneys' fees as found by the jury. We submitted the question of the amount to the jury, be assessed against Mr. Clyde Carter, and our request that the [p. 47] auditor's fee be taxed against Mr. Clyde Carter, and I'm going to go through those in a minute, and that his million-dollar fee and compensation be ordered forfeited and reimbursed to the trust. But I think that this Court has ample statutory and constitutional authority to enter the Judgment, and we have requested it.

The next point that was raised by Mr. Carter is a usury allegation. I would point Your Honor – Suffice it to say that we disagree with their usury allegations, both on a factual and legal allegation – Crain versus San Jacinto Savings Association, which we believe is directly on point, the only claim – Assume for a moment there was

usurious charging, they are claiming that occurred when we circulated our proposed draft on our Motion for Judgment. Your Honor, the case of Crain versus San Jacinto Savings Association held specifically that a Motion to Enter Judgment cannot, as a matter of law, constitute the charging of interest. That case is on appeal to the Supreme Court. It's been there since 1989. I don't know [p. 48] what, why it's still hanging up there, but the writ was granted. There's been no decision.

That Court says there are some cases that say there can be or there was dicta in a Supreme Court case that said a pleading could constitute a charge of usury. The Crain case distinguishes that. A pleading is more in the nature of a demand that is there without judicial intervention. The Motion to Enter Judgment is left to the discretion of the Judge. We find, as a matter of law, it cannot be a charging of interest. One of the things we did, Your Honor, rather than belabor this point any further, it we have deleted our request for pre-judgment interest on the one million dollar figure and on. I think that was the only thing we specifically asked for statutory pre-judgment interest on was the one million dollar figure against Mr. Clyde Carter. We also deleted our figure for, against Mr. David Carter. He had raised an issue on that. We deleted all requests for statutory pre-judgment interest. I'll let them argue the rest of that, as far as [p. 49] the usury.

The real issue, I think, comes down to their allegation that our $7 million figure contains a charging of interest factor that was usurious. Your Honor, I realize that the counsel that are preparing this brief were not the trial counsel and perhaps were not fully cognizant of the way

the damage issue was presented at trial, but we have cited the Court in the background section and in this section to the various portions of the Statement of Facts where we presented evidence on our damage claim. Contrary to what Mr. Carter's counsel thinks, we presented evidence that the actual damages were close to $7 million, not that they were $3 million and then we added on, you know, pre-judgment interest. What we were showing, Your Honor, was the diminution in value in the trust due to the acts of Clyde Carter. The precise testimony is what would this trust have been worth if the money that was misappropriated by Clyde Carter had been left in at a reasonable rate of return that is allowed in Texas. Your Honor, under the [p. 50] Trust Code – I've cited the Trust Code section for you at page 13. It is Property Code Section 114.001. It says "A trustee who commits a breach of the trust is chargeable with any damages resulting from such breach of trust, including but not limited to, loss or depreciation in value, any profit made and any profit that would have accrued."

What we did, and there are also – this is also from the common law. Your Honor, which has always held that a trustee, in part, because he is also obligated under his fiduciary duty to keep trust property productive, a trustee who misappropriates trust funds can be held for lost profits. How do you want to calculate that? In terms of interest, or whether you want to look at it, we could have invested this piece of real estate, is up to the evidence introduced at trial. We elected to go on the basis of expert testimony showing that during the thirteen-year time period involved, there was a range of interest which could have been earned had these funds been invested in

a conservative investment. We showed the range [p. 51] from eight and a quarter, I believe, to, I believe, fifteen percent, because this was during the early eighties when money market CDs and treasury bonds were earning significant interest.

We – Our expert testified that ten percent was a fair and conservative interest factor in the terms of the lost investment opportunity during that entire range of years. This is not statutory pre-judgment interest. This is consequential damages as that term is used in the Trust Code, and I'm sure the Court is familiar with the Hatley versus Maxindale or whatever it was we learned in law school, but this is lost profits. It is not statutory pre-judgment interest. We are not relegated to that.

In our Motion for Judgment, we did not ask for pre-judgment interest on the $7 million. One thing I didn't feel it was appropriate because our damages had included – Our request for damages included the loss of this investment opportunity up to the time of trial. So I think that their argument on the $7 million is based more on a [p. 52] misconception of damages that were introduced.

I have cited the Court to the exhibit. They cite the Court to one exhibit saying that, saying that the, we were showing only $3 million in actual damages.

Your Honor, what I would like to show you is a copy of Exhibit 126 which was introduced at trial. The actual exhibit in the clerk's possession, I would assume. But in that we showed this column would be the amount actually misappropriated that we claimed was misappropriated. This was our interest loss, interest factor, the other

$3 million. This is the six million nine hundred something thousand that the total was, and that's the per diem. The jury was entitled to utilize these numbers and come up with whatever number they determined was the monetary loss to the trust.

I might also mention to the Court that this particular argument that our damage evidence and that the jury questions submitted on the issue of damages contained "pre-judgment interest' was never made until [p. 53] this motion on the opposition to the Motion to Enter Judgment. They did not object to that testimony on that basis at the time it was introduced. They did not object to the submission of the damage issue on that basis, and I don't know if you want to keep that. That was just an extra copy I wanted to show you for illustration. You're welcome to.

Any objection they had that this was anything other than appropriate measure of damages, lost profits, was waived and not timely presented.

Your Honor, the next issue that we addressed was the forfeiture of the million-dollar fee. Mr. Carter's counsel did not brief this to the Court in their brief. I can only – I'm not sure – other than they were arguing that we were going to have to waive that because of the usury allegation.

What I've submitted in our brief, Your Honor, is that we feel that the jury's answers that found not only Clyde Carter knowingly breached his fiduciary duties, but that breach was willful and in bad faith. I'm now on page 16 of the brief. We had [p. 54] findings of willful and a bad

faith breach of fiduciary duty. We found, had jury findings of loss to the tune of $7 million. We feel that, and I have cited the Court to some cases which show that the law in Texas has always been that the fiduciary who breaches his duty is not entitled to retain his compensation. That has been codified under Section 114.061(b). It is also in the Probate Code, Section 241(a)(1), but the Court is given discretion to deny all or part of the compensation to the fiduciary who has breached his trust.

We would request the Court to examine Mr. Clyde Carter's testimony in reaching this decision. We think you will find, Your Honor, that he did not deny any of the transactions that he was accused of, that rather, his defense was they should have stopped me sooner. It's their fault. Heck, I was doing so much good for these people, they shouldn't mind if I did a little bit of this or a little bit of that. We would request that you examine the testimony of Elwood Cluck, one of Mr. Carter's primary [p. 55] attorneys, and particularly the testimony about how Mr. Cluck and Mr. Carter utilized this trust as their own private bank account, handling all kinds of private work for Mr. Carter, his tax audits, his buying property and everything, to show that their, you know, what the jury was confronted with as far as reaching their conclusion that he willfully breached his trust and that he did it in bad faith.

We feel that the Court has discretion. It's got the Statement of Facts available to peruse the evidence and that the Court should exercise its discretion given to him under the Property Code and Probate Code to order or add that to the Judgment. Obviously, we have to deal

with the Bankruptcy Court as far as getting it back, in addition to the amounts found by the jury.

Your Honor, the request for the offset and – the Motion to Sever, of course, we've already discussed. I'll let Mr. Golden discuss this offset question, and just move very briefly to the issue of attorneys' fees, which we've covered on page 20, and I guess I [p. 56] need to cover the auditor's fee, which is on page 14.

Again, there was no brief submitted by Mr. Clyde Carter's attorneys on the issue on the auditor's fees or the attorneys' fees. They had objections basically saying you shouldn't do it. We have endeavored to give the Court the legal rationale and the evidentiary background to support the Court's exercise of discretion on both of these issues. The auditor's fee, Your Honor, and I would like to note for the Court on page 15, I have two typographical errors in the case cite. Top of page 15, the case of Beaty versus Bales. That should be 677 S.W.2d, not 667. And the case of Scott versus Taylor should be 294 S.W.1st, and it's an Amarillo 1927 no writ case. I apologize. I'm not sure – as I was saying, my secretary got sick and whoever was typing it might have picked up something that's a combination of cases.

On the auditor's fees, Your Honor, this was, the background of this is as follows: In 1986, late 1986, the other two [p. 57] co-trustees started discovering some rather questionable transactions that apparently Clyde Carter was engaged in. They sent a lawyer to investigate it. Things started getting a little hot. Clyde then said, "Let's terminate."

MR. SAM DIBRELL: I hate to rise to interrupt, but I've just about kind of – I appreciate the attempt at trying to inform the Court, but I think the issue's going to be is what's in those Statements of Fact, Your Honor, and I think that counsel is probably trying her best to present as she envisions it, but I've got a different viewpoint on a number of things, and I think we're really getting further and further apart from our viewpoint on the matter and I raise an objection as to getting into facts that the Court has not heard.

If the Court's going to rely on the Statement of Facts, that's one thing. It it's going to rely on counsel and the brief and argumentation, then I object to the Court making a discretionary ruling on that, and I apologize for interrupting counsel, but I [p. 58] think we're getting far afield from a Motion to Enter Judgment when we're trying to picture the facts as we see them.

THE COURT: I'll overrule the objection but I will rely on the Statement of Facts and I will listen to either side who wants to characterize the facts, but I will rely on the Statement –

MS. MOORE: I understand, Your Honor, and we have given you specific references to the Statement of Facts in our brief for each of these topics. What I was getting to, Your Honor, is Clyde, after things, after people, after the two co-trustees started discovering that there were some problems in what Mr. Carter had done, he submitted a proposal to terminate this trust. The problem was, he wouldn't agree to give an accounting, so not all the beneficiaries would agree to it. He refused to give them a final audited accounting, particularly, you know,

and I think the thrust behind the request for the accounting was obviously that certain items had been discovered. I'm sure this Court is aware of

* * *

Rule 272. Requisites

The charge shall be in writing, signed by the court, and filed with the clerk, and shall be a part of the record of the cause. It shall be submitted to the respective parties or their attorneys for their inspection, and a reasonable time given them in which to examine and present objections thereto outside the presence of the jury, which objections shall in every instance be presented to the court in writing, or be dictated to the court reporter in the presence of the court and opposing counsel, before the charge is read to the jury. All objections not so presented shall be considered as waived. The court shall announce its rulings thereon before reading the charge to the jury and shall endorse the rulings on the objections if written or dictate same to the court reporter in the presence of counsel. Objections to the charge and the court's rulings thereon may be included as a part of any transcript or statement of facts on appeal and, when so included in either, shall constitute a sufficient bill of exception to the rulings of the court thereon. It shall be presumed, unless otherwise noted in the record, that the party making such objections presented the same at the proper time and excepted to the ruling thereon.

Rule 274. Objections and Requests

A party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection. Any complaint as to a question, definition, or instruction, on account of any defect, omission, or fault in pleading, is waived unless specifically included in the objections. When the complaining party's objection, or

requested question, definition, or instruction is, in the opinion of the appellate court, obscured or concealed by voluminous unfounded objections, minute differentiations or numerous unnecessary requests, such objection or request shall be untenable. No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only.

RULE 52. PRESERVATION OF APPELLATE COMPLAINTS

(a) General Rule. In order to preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling he desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. If the trial judge refuses to rule, an objection to the court's refusal to rule is sufficient to preserve the complaint. It is not necessary to formally except to rulings or orders of the trial court.

(b) Informal Bills of Exception and Offers of Proof. When the court excludes evidence, the party offering same shall as soon as practicable, but before the court's charge is read to the jury, be allowed to make, in the absence of the jury, an offer of proof in the form of a concise statement. The court may, or at the request of a party shall, direct the making of the offer in question and answer form. A transcription of the reporter's notes showing the offer, whether by concise statement or question and answer, showing the objections made, and showing the ruling thereon, when included in the record certified by the reporter, shall establish the nature of the evidence, the objections and the ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made and the ruling. No further offer need be made. No formal bills of exception shall be needed to authorize appellate review of the question whether the court erred in excluding the evidence. When

the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections.

(c) Formal Bills of Exception. The preparation and filing of formal bills of exception shall be governed by the following rules:

(1) No particular form of words shall be required in a bill of exception, but the objection to the ruling or action of the court shall be stated with such circumstances, or so much of the evidence as may be necessary to explain, and no more, and the whole as briefly as possible.

(2) When the statement of facts contains all the evidence requisite to explain the bill of exception, evidence need not be set out in the bill; but it shall be sufficient to refer to the same as it appears in the statement of facts.

(3) The ruling of the court in giving or qualifying instructions to the jury shall be regarded as approved unless a proper objection is made.

(4) Formal bills of exception shall be presented to the judge for his allowance and signature.

(5) The court shall submit such bill to the adverse party or his counsel, if in attendance on the court, and if found to be correct, the judge shall sign it without delay and file it with the clerk.

(6) If the judge finds such bill incorrect, he shall suggest to the party or his counsel such corrections as he

deems necessary therein, and if they are agreed to he shall make such corrections, sign the bill and file it with the clerk.

(7) Should the party not agree to such corrections, the judge shall return the bill to him with his refusal endorsed thereon, and shall prepare, sign and file with the clerk such bill of exception as will, in his opinion, present the ruling of the court as it actually occurred.

(8) Should the party be dissatisfied with said bill filed by the judge, he may, upon procuring the signatures of three respectable bystanders, citizens of this State, attesting to the correctness of the bill as presented by him, have the same filed as part of the record of the cause; and the truth of the matter in reference thereto may be controverted and maintained by affidavits, not exceeding five in number on each side, to be filed with the papers of the cause, within ten days after the filing of said bill and to be considered as a part of the record relating thereto. On appeal the truth of such bill of exceptions shall be determined from such affidavits.

(9) In the event a formal bill of exceptions is filed and there is a conflict between its provisions and the provisions of the statement of facts, the bill of exceptions shall control.

(10) Anything occurring in open court or in chambers that is reported and so certified by the court reporter may be included in the statement of facts rather than in a formal bill of exception; provided that in a civil case the party requesting that all or part of the jury arguments or the voir dire examination of the jury panel be included in the statement of facts shall pay the cost thereof, which

cost shall be separately listed in the certificate of costs prepared by the clerk of the trial court, and the same may be taxed in whole or in part by the appellate court against any party to the appeal.

(11) Formal bills of exception shall be filed in the trial court within sixty days after the judgment is signed in a civil case or within sixty days after the sentence is pronounced or suspended in open court in a criminal case, or if a timely motion for new trial has been filed formal bills of exception shall be filed within ninety days after the judgment is signed in a civil case or within ninety days after sentence is pronounced or suspended in open court in a criminal case. When formal bills of exception are filed they may be included in the transcript or in a supplemental transcript.

(d) Necessity for Motion for New Trial in Civil Cases. A point in a motion for new trial is prerequisite to appellate complaint in those instances provided in Rule 324(b) of the Texas Rules of Civil Procedure. A party desiring to complain on appeal in a nonjury case that the evidence was legally or factually insufficient to support a finding of fact, that a finding of fact was established as a matter of law or was against the overwhelming weight of the evidence, or of the inadequacy or excessiveness of the damages found by the court shall not be required to comply with paragraph (a) of this rule.